

STATEMENT OF
THE CASE OF
THE GOVERNMENT OF THE DOMINION
OF CANADA
REGARDING THE BOUNDARIES
OF THE
PROVINCE OF ONTARIO.

PREPARED BY

HUGH MACMAHON, Q. C.,

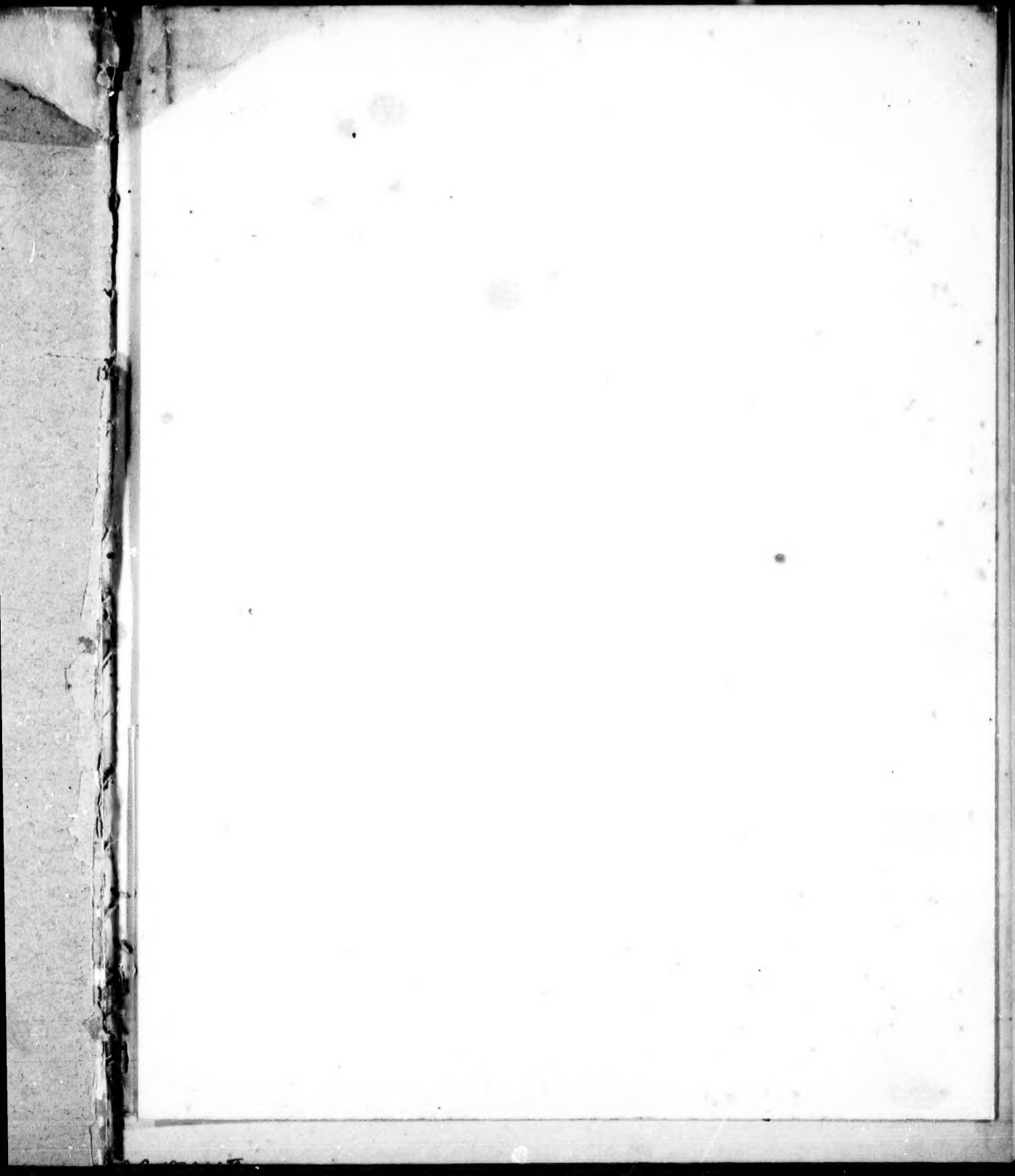
COUNSEL FOR THE DOMINION.

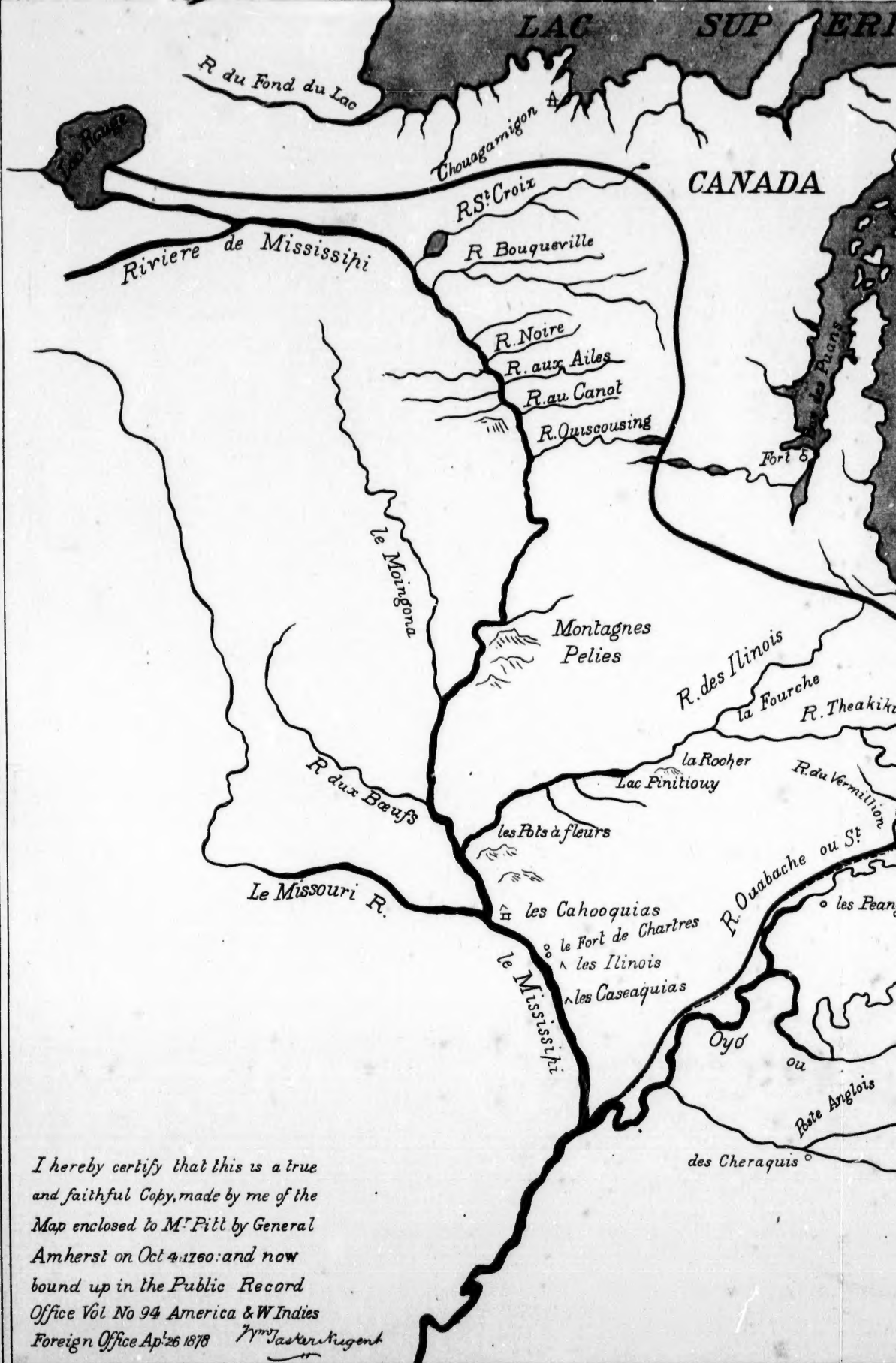
Tondon, Ont. :

1876.

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I hereby certify that this is a true
 and faithful Copy, made by me of the
 Map enclosed to M^r Pitt by General
 Amherst on Oct 4. 1760: and now
 bound up in the Public Record
 Office Vol No 94 America & W Indies
 Foreign Office Apr 26 1878 *Wm Jaster Kingent*



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STATUTES OF

THE GOVERNMENT OF THE DOMINION

OF CANADA

REGULATING THE LAND TAXES

IN THE PROVINCE OF ONTARIO

ABBREVIATIONS.

Ont. Docts.

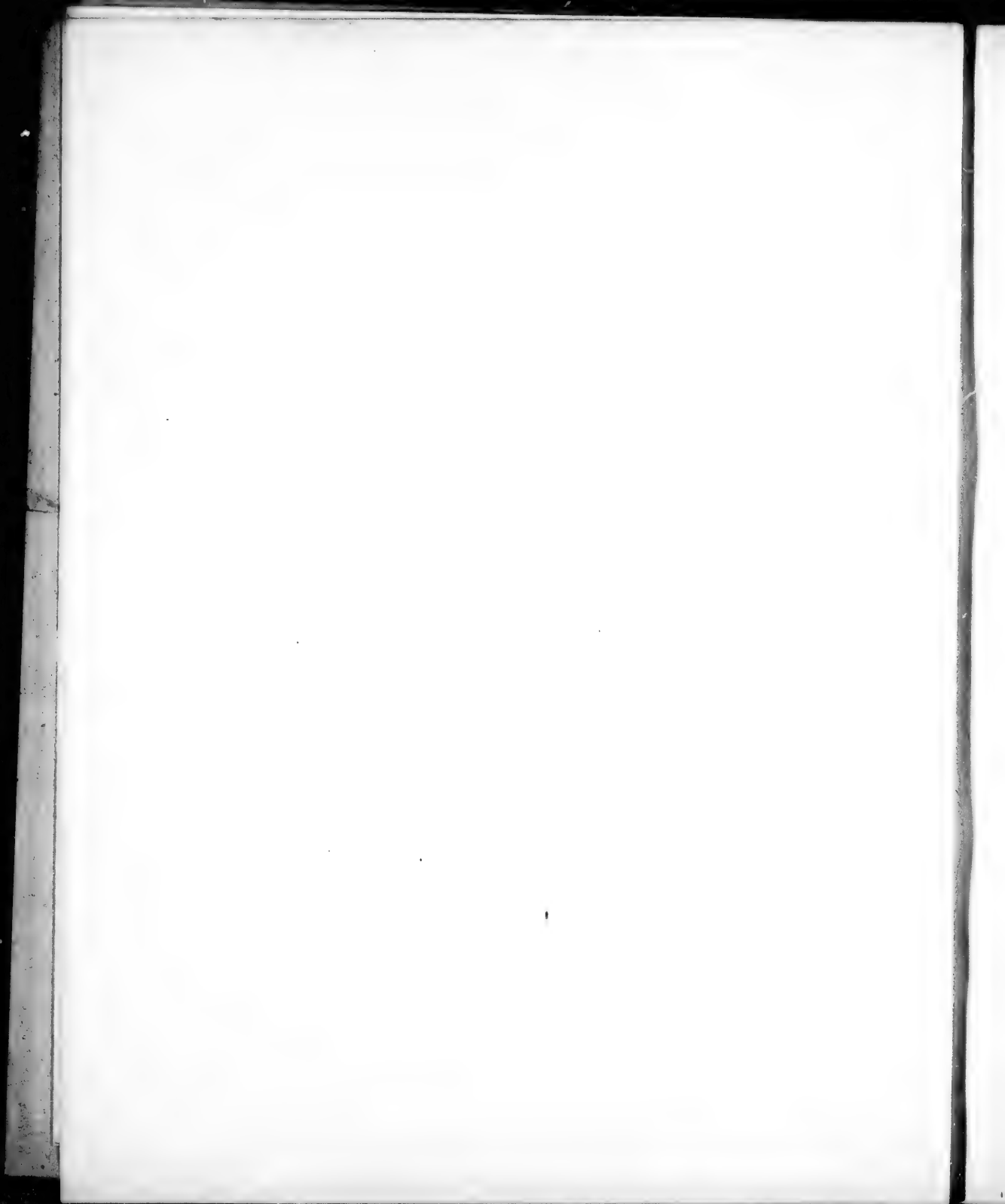
Statutes, Documents and Papers respecting the Northern and Western Boundaries of Ontario, compiled by direction of the Government of Ontario.

Mills.

Revised Report for the purpose of the Arbitration between the Dominion of Canada and Province of Ontario, by David Mills, Esq., M. P.

Papers relating to
H. B. Co. presented
to House of Com-
mons.

Papers presented by command of Her Majesty to the House of Commons in pursuance of an address respecting the Territory, Trade, Taxation and Government claimed or exercised by the Hudson's Bay Company. (Ordered by House of Commons to be printed, 12th July, 1850.)



STATEMENT OF THE CASE
OF THE
GOVERNMENT OF THE DOMINION OF CANADA
REGARDING THE
BOUNDARIES OF THE PROVINCE OF ONTARIO.

The limits assigned to the Province of Ontario by the British North America Act, 1867, Sect. 6, are such part of the Province of Canada as at the passage of the Act formerly constituted the Province of Upper Canada.

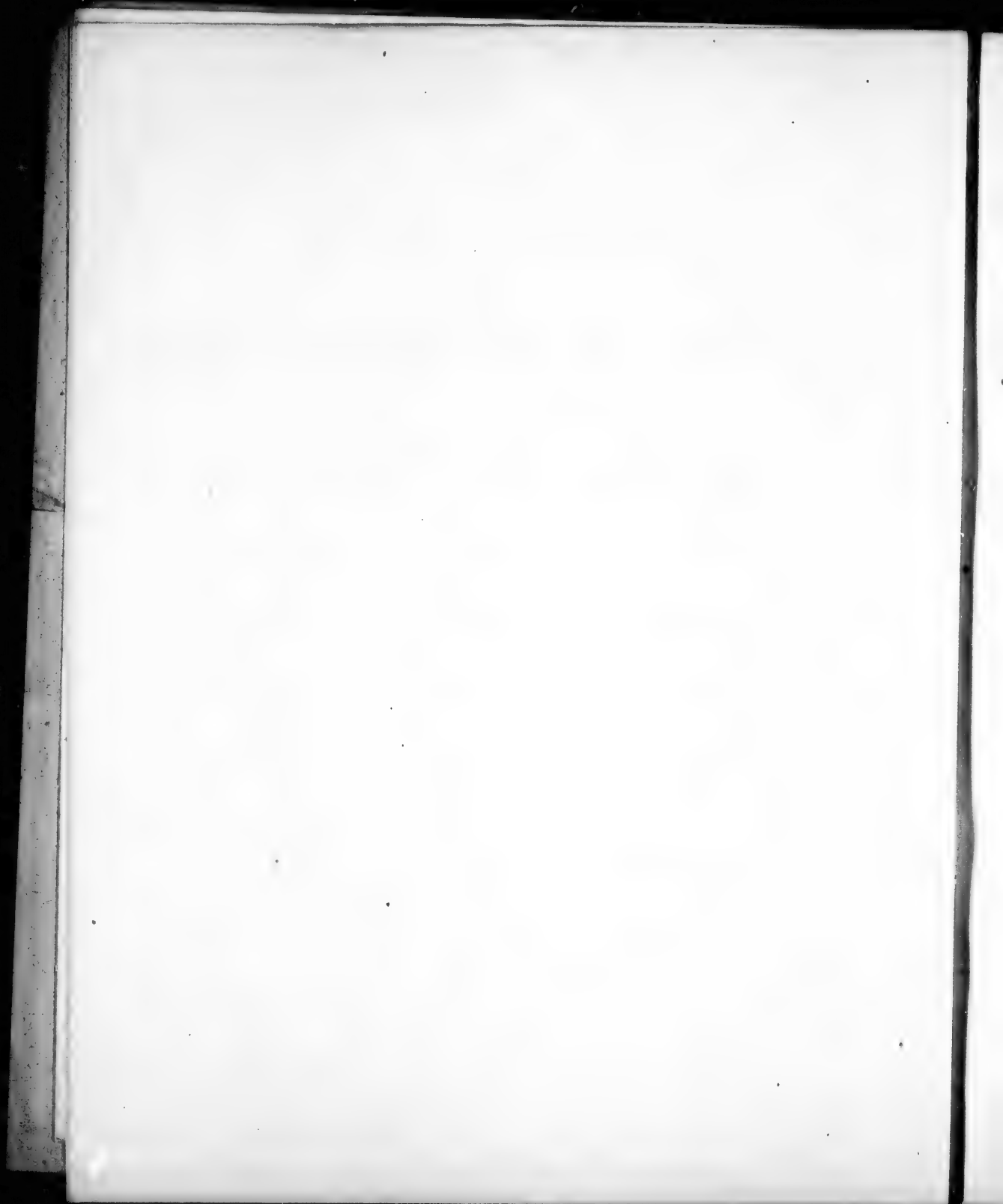
The claim of the Dominion of Canada is, that the meridional line drawn due north from the junction of the Ohio and Mississippi rivers (ascertained to be $89^{\circ} 9' 27''$ west) forms the western boundary of Ontario, and that the land's height of the northern water-shed of the St. Lawrence is the northern boundary.

The Government of Ontario contend that the western limit of that Province is the Rocky Mountains; that the north-western limitary line lies north of the Saskatchewan; and that the north-eastern line lies in the vicinity of Hudson's Bay. (Mills, p. 1.)

The claim of Ontario to extend the western limit of the Province to the Rocky Mountains rests, it is assumed, upon the supposed title of France to that country, as having been the first discoverers thereof. It was stated by M. de Callières, when writing to M. de Seignelay in 1685 (N. Y. His. Doc., Vol. IX, p. 265), that the French were the first to discover Hudson's Bay, and that nation was therefore entitled to the whole country to the base of the Rocky Mountains; and the rule of international law on which this is claimed is thus stated by M. de Callières: "It is a custom established and a right recognized by all Christian nations that the first who discovers an unknown country not inhabited by Europeans, and who plant in it the arms of their prince, secure the property thereof to that prince in whose name they have taken possession of it."

L'Escarbot, in 1617, stated that "New France has for its limits on the western side the lands as far as the sea called the Pacific, on this side the Tropic of Cancer; on the south the islands of the Atlantic Sea, in the direction of Cuba and the island of Hispaniola; on the east by the Northern Sea, which bathes New France; and on the north that land called 'Unknown' towards the icy sea as far as the Arctic Pole." (Ont. Docts., p. 53.) So that the whole of the north-western portion of the continent was claimed as belonging to France.

It will be necessary briefly to show upon what these claims are founded; and then to consider if they have any value as bearing on the question to be decided by the arbitrators.



In 1626, Louis XIII. granted to the Company of New France a charter which, it is asserted, included the whole of the country about Hudson Bay and west of it.

The Indians from the vicinity of Hudson's Bay came to Montreal to trade; hence it is said there was no necessity for erecting forts and trading posts. (Mills, p. 127.)

It is stated that Jean Bourdon, the Attorney-General in 1656, explored the entire coast of Labrador and entered Hudson's Bay.

It appears that in the year 1656 there was an order of the Sovereign Council of Quebec authorizing Sieur Bourdon, its Attorney-General, to make a *discovery* thereof.

There is no record whatever of his having attempted to make the discovery in the same year in which the order was passed by the Council. There is a record, however, of his having made the attempt in the year following (1657), and he may then have designed carrying out the order. He sailed on the 2nd day of May and returned on 11th August, 1657; and it is not pretended that he could have made a voyage to Hudson's Bay and return between these dates. (Journal des Jesuites pp. 209-218.) As to the extent of this voyage there can be no doubt, as in the Rel. de Jests., Vol. III., Rel. 1658, p. 9, it is thus reported:—

“Le 11 (August) parut la barque de Monsieur Bourdon lequel estant descendu sur le grand fleuve du Costé du Nord voyagea jusques au 55 degré au il rencontra un grand banc de glace qui le fit remonter aiant perdu deux Hurons qu'il avait pris pour guides Les Esquimaux sauvages du Nord les-massacrèrent et blessèrent un François de trois coups de flèches et d'un coup de couteau.”

The Jesuits would have known if Jean Bourdon had entered the Straits of Hudson, and would have mentioned it in their Relations. On the contrary, they never mention it, and it is to be taken from that the assertion that that he ever entered Hudson's Bay is a myth, because he was of the Province of Quebec, and was a man well known and trusted by the Jesuits, and went with Father Jaques on an embassy to Governor Dongan of New York.

It is asserted that Father Dablon and Sieur de Valliere were in 1661 ordered by Sieur d'Argenson, Governor of Canada, to proceed to the country about Hudson's Bay, and they went thither accordingly, and the Indians who then came back with them to Quebec declared that they had never seen any Europeans there before.

In Shea's Charlevoix, Vol. III., pp. 39 and 40, it is stated that he (Father Dablon) *attempted* to penetrate to the Northern Ocean by ascending the Saguenay. Early in July, two months after they set out, they found themselves at the head of the Nekauba River, 300 miles from Lake St. John. They could not proceed any further, being warned by the approach of the Iroquois.

Rev. Claude Dablon arrived in Canada in 1655, and was immediately sent missionary to Onondaga, where he continued with a brief interval until 1658. In 1661 he set out overland for Hudson's Bay, but succeeded in reaching only the head waters of the Nekauba, 300 miles from Lake St. John. (N. Y. His. Doc., Vol. IX., p. 97, note 2.—*Ed.*)

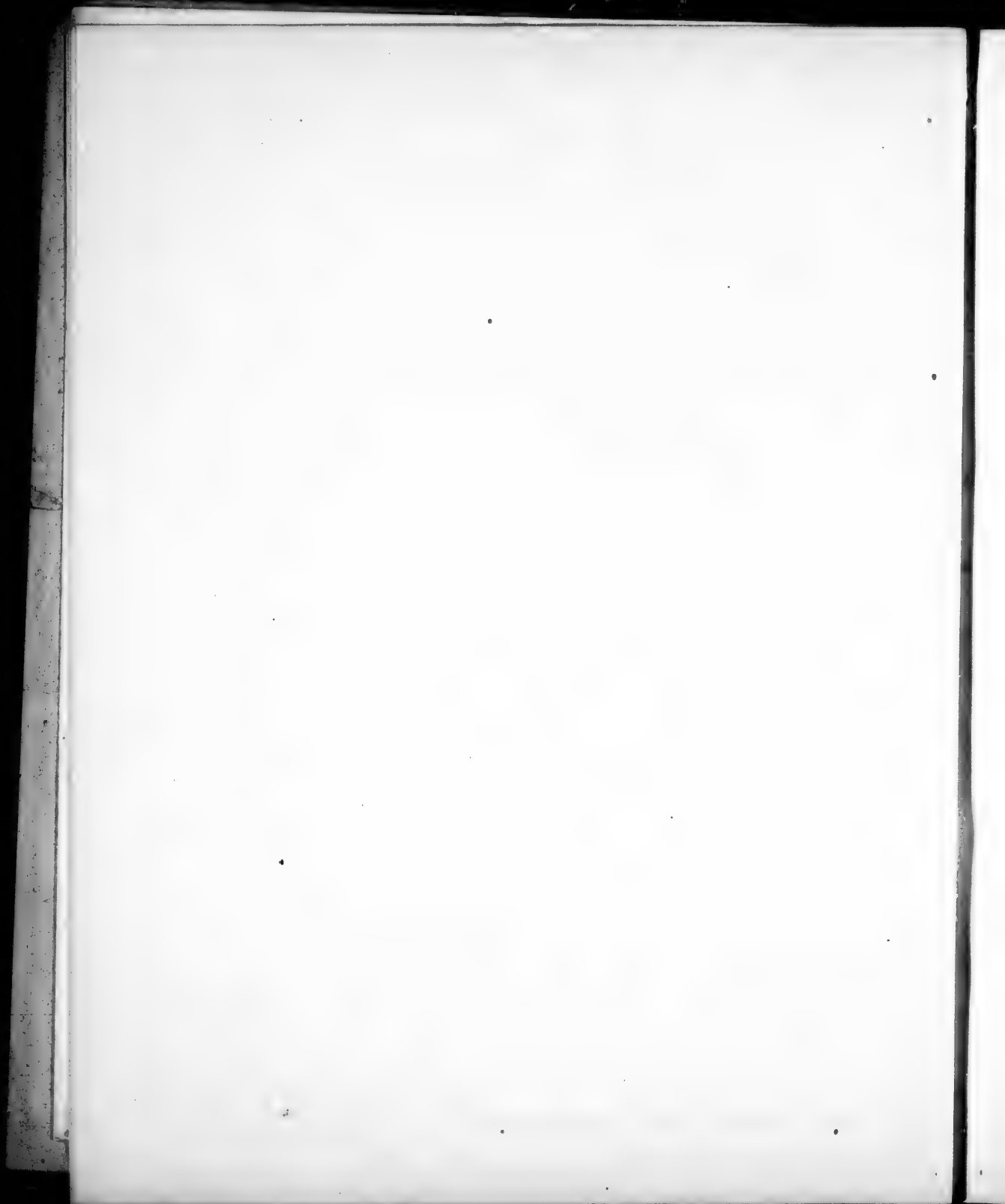
In the *Rel. de Jesuits*, Vol. III (1661), p. 13, there is an account of this voyage, which is called “*Journal du premier voyage fait vers la mere du Nord.* (12 Août, 1661.)” The account is dated from the highest point they reached, Nekauba, 100 lieues de Tadousac, 2 Juillet, 1661:

“1661 Juillet le 27 retournerent ceux qui estoient allés ou pretendoient aller à la mer du Nord au Kiristinons P. Dablon &c.” (Journal du Jesuits, p. 300.)

An assertion is made that some Indians came from about Hudson's Bay to Quebec in 1663, and that Sieur la Couture with five men proceeded overland to the Bay possessions, whereof they took in the King's name.

There is no record of this voyage. No mention is made in Charlevoix or in the Relations of the Jesuits respecting Couture or his expedition.

Sieur Duquet, King's Attorney for Quebec, and Jean L'Anglois, a Canadian colonist, are said to have gone to Hudson's Bay in 1663 by order of Sieur D'Argenson and renewed the act of taking possession by setting up the King's arms there a second time.



Viscount D'Argenson, who is stated by Mr. Mills at p. 129 of his Revised Report to have given the order to Duquet to proceed to Hudson's Bay, left Canada on 16th September, 1661, two years prior to the giving of the order, which it is stated *Sieur Duquet* received. (*Shea's Charlevoix*, Vol. III., p. 65, note 5 and p. 17. *N. Y. His. Docs*, Vol. IX., p. 17.)

In 1666 or 1667, Radisson and des Grosellières were roaming among the Assiniboinés in the region of Lake Winnipeg, and were conducted by members of that tribe to the shores of Hudson's Bay. (*Mills*, p. 8.)

Father Albanel and *Sieur St. Simon* were, in November, 1671, sent by M. Talon to Hudson's Bay, which they reached in 1672.

In the Relations of the Jesuits, Albanel gives an account of his trip, and shows that the English Company were already in possession of Hudson's Bay, having entered there under their charter.

It is quite apparent from the Relation that no one had on behalf of France visited Hudson's Bay prior to his visit in 1672. Father Albanel says:—

"Jusques icy on avoit estimé ce voyage impossible aux Francois, qui apres l'avoir entrepris déjà par trois fois, et n'en ayant pu vaincre les obstacles, s'estoient veu obligez de l'abandonner dans le desespoir du succez. Ce qui paroist impossible, se trouve aisé quand il plaist à Dieu. La conduite m'en estoit deüé, apres dix-huit ans de poursuites que j'en avois faite, et j'avois des preuves assez sensibles que Dieu m'en reservoit l'execution, apres la faveur insigne d'une guerison soudaine et merveilleuse, pour ne point dire miraculeuse, que je receus des que je me fus devoüé à cette mission, à la sollicitation de mon Superieur." (*Rel. Jests*, 1672, p. 56.)

Up to this time (1672) the Jesuits do not appear to have heard of any prior expedition having reached Hudson's Bay.

What is relied upon by the Province of Ontario as furnishing evidence of Father Dablon and *Sieur Couture* having visited Hudson's Bay is a memoir of M. de Callières sent to the Marquis de Seiquelay in 1681 (*N. Y. His. Docs*, Vol. IX., p. 268), and M. de Denonville, on 8th Nov., 1686, by a memoir sent to M. de Seiquelay, appears to have copied the statement made by M. de Callières. (See *ibid*, p. 304.) But in his letter which accompanies the memoir M. de Denonville says: "I annex to this letter a memoir of our rights to the entire of that country of which our registers ought to be full, but no memorials of them are to be found." (*N. Y. His. Docs*, Vol. IX., p. 297.) M. de Denonville thereby admits that documentary evidence could not even at that time be adduced in support of these visits having been made to Hudson's Bay.

At the time that M. de Callières and M. de Denonville wrote (in 1684 and 1686) it was most important to show if possible that Dablon and Couture had been at Hudson's Bay. The French, before that time, had driven the English from a number of their Forts; and in March, 1686, Canadian troops were sent by Denonville who surprised and captured Forts Albany, Hayes and Rupert, belonging to the Hudson's Bay Company; and it therefore became necessary to show a color of right for these proceedings, and these memoirs were prepared with that view.

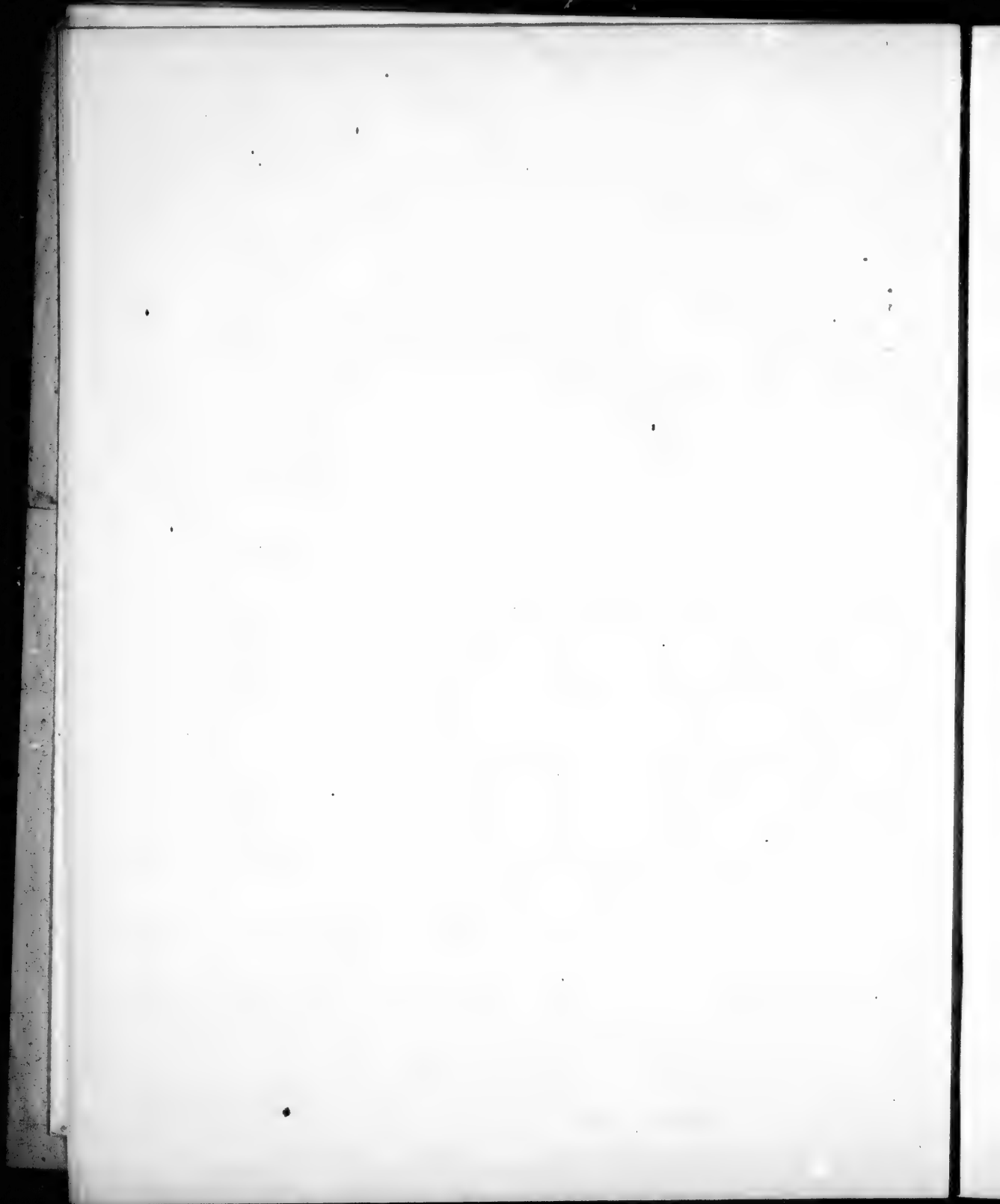
ENGLISH DISCOVERY.

1517.

Sebastian Cabot, who sailed to Hudson's Bay and Straits under a commission from Henry VII. of England, entered the Bay, which, in 1610, took the name of Hudson. This is admitted by Mr. Mills, pp. 122 and 123. (See Bacon's History of Henry VII. Hakluyt, Vol. III, pp. 25, 26 and 27.)

1576, 1577 and 1578.

Sir Martin Frobisher, it is said, made three voyages to Hudson's Bay. He entered Hudson's Bay in 1576, and gave the name to Frobisher's Straits. (*Mills*, p. 123. Hakluyt, Vol. III., pp. 55 to 95. Pinkerton's Collection, Vol. XII., pp. 490-521.)



1608-1610.

According to the narrative of Prickett (who was with Hudson during the voyage), to be found in Harris's Voyages, Vol. II., pp. 243-4, Hudson sailed on 17th April, 1610, reached the Bay now known as "Hudson's" in July of that year and wintered in the Bay, and remained there until late in the summer of 1611.

1611.

It was desired to prosecute the discoveries made by Hudson, and in 1611 His Royal Highness Henry Prince of Wales was applied to by persons concerned in the project, and he resolved to send Captain Button, who penetrated to the Hudson's Bay and sailed 200 leagues to the north-west. He wintered there at Nelson River. (Harris, Vol. II., pp. 245-404.)

1631.

It appears that the English nation had been trading with Greenland, and those trading finding that "other nations were interfering with this trade" found themselves under a necessity of having recourse to the Crown for protection and assistance, as well for defending their fisheries as for prosecuting their discoveries, and they accordingly addressed themselves to King Charles I., who furnished them with a frigate called "The Charles," under command of Captain Luke Fox, who sailed in the spring of 1631, in order to make discoveries towards the North-west. Captain Fox and Captain James met at Fort Nelson in August, 1631.

Capt. Thomas James undertook his voyage in 1631 for the satisfaction of Charles I. at the expense of the merchants of Bristol. The account of the voyage was written by himself and published in 1633. Captain James left England in May and met Captain Luke Fox on 29th August near Port Nelson. He wintered in Hudson's Bay. (Harris's Travels, Vol. II, pp. 407, 409 and 413.)

1667 and 1668.

Des Grosellières and Radisson (who it is supposed were *Coueurs des bois*) were roaming among the Assiniboines and were conducted by them to Hudson's Bay.

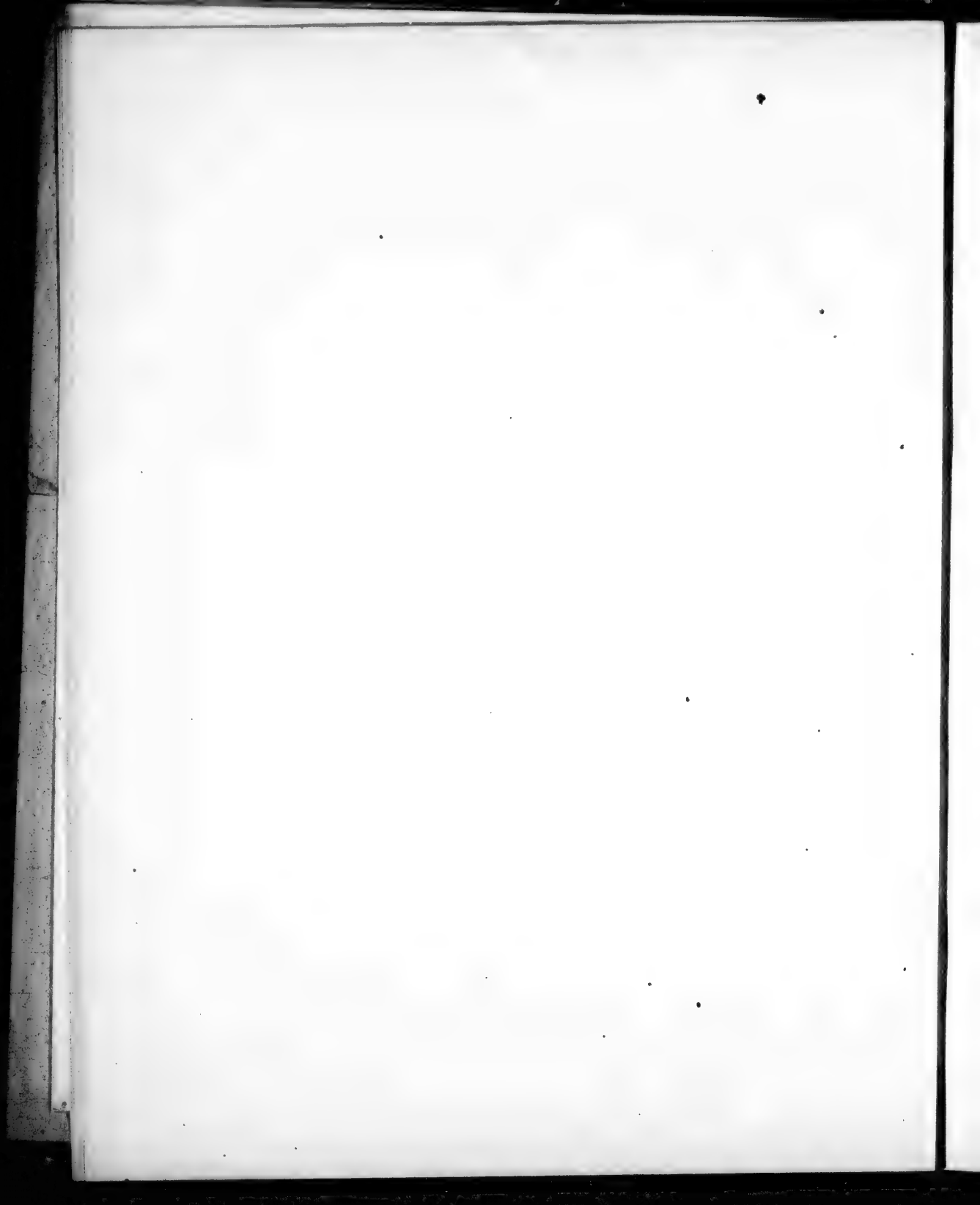
Des Grosellières and Radisson went to Quebec for the purpose of inducing the merchants there to conduct trading vessels to Hudson's Bay. The proposal was rejected, as the project was looked upon as chimerical by the Quebec merchants. (Ont. Docts. p. 280.) (This does not accord with the pretensions of the French that Jean Bourdon had made a voyage there in 1656 or 1657.)

Des Grosellières was in London in 1667, and before going there had been in Boston and Paris in search of persons willing to fit out an expedition to explore Hudson's Bay. He met with a favorable reception, and the London merchants employed Z. Gillam, a person long used to the New England trade, to perfect this discovery. Gillam sailed in the "Nonsuch" in 1667, and on his arrival built Fort Charles, said to have been the first fort erected in the Bay, and upon his return those engaged in the enterprise applied to Charles II. for a patent, which was issued on 2nd May, 1670, to Prince Rupert and others. (Harris's Voyages, Vol. II., p. 286.)

1669.

Captain Newland was sent out in 1669 by the same parties who in 1667 sent out Z. Gillam.

As far as the Hudson's Bay territory is concerned the English were first, both as to discovery and occupation. So long as the English were not there the Indians came to Montreal and Quebec, and the French derived the benefit of the trade, which was all that was required, and they could then afford to treat as chimerical the statements of Radisson and Des Grosellières that Hudson's Bay could be reached with ships. But once the English occupied the territory, erected forts and created settlements, whereby the French fur trade was cut off from the west and north, then it became necessary for them to claim title by discovery. Hence the memoir of M. de Callières to M. Seiquelay, which is shown cannot be relied upon, and which De Denonville says there are no memorials to support.



If possession is to form a claim to the country, the evidence that the English first made a settlement and thus took possession is of the clearest character, for it is not seriously pretended that any actual possession was taken nor any settlement made until Gillam went to Hudson's Bay and built Fort Charles in 1667.

What, then, did England obtain by taking possession and making a settlement for the purpose of occupancy by building the numerous forts on Hudson's Bay in the year 1667 and during subsequent years? According to Vattel, Book I, Chap. 18, Sect. 207, "Navigators going on voyages of discovery furnished with a commission from their Sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation; and this title has been usually respected, provided it was soon after followed by real possession."

"When a nation takes possession of a country, with a view to settle there, it takes possession of everything included in it, as lands, lakes, rivers, &c." (Ibid, Chap. 22, Sect. 226.)

"In the negotiations between Spain and the United States respecting the western boundary of Louisiana, the latter country laid down with accuracy and clearness certain propositions of law upon this subject, and which fortify the opinion advanced in the foregoing paragraphs. 'The principles (America said on this occasion) which are applicable to the case are such as are dictated by reason and have been adopted in practice by European Powers in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and, at the same time, founded in strict justice. The first of these is, that when any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right, in exclusion of all other nations, to the same. (See *Memoire de l'Amérique*, p. 116.) It is evident that some rule or principle must govern the rights of European Powers in regard to each other in all such cases; and it is certain that none can be adopted, in those to which it applies, more reasonable or just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a range of territory so described for the same society to have connected its several parts together by the ties of a common interest, and to have detached them from others. If this principle is departed from it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition; but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of an European Power who discovered and took possession of a new country to the spot on which its troops or settlement rested—a doctrine which has been totally disclaimed by all the Powers who made discoveries and acquired possessions in America.' (Phillimore's *Intl. Law*, 2 ed., Vol. I., pp. 277-8-9.)

Sir Francis Twiss, in his discussion on the Oregon question, at page 300 states that "Great Britain never considered her right of occupancy up to the Rocky Mountains to rest upon the fact of her having established factories on the shores of the Bay of Hudson, *i. e.*, upon her title by mere settlement, but upon her title by discovery confirmed by settlements in which the French nation, her only civilized neighbor, acquiesced, and which they subsequently recognized by treaty."

The British nation, therefore, acquired, by discovery and by settlements made on Hudson's Bay, the possession of the country extending into the interior to the sources of the rivers emptying within that coast, which would include the Saskatchewan and English Rivers to the west, having their sources at the foot of the Rocky Mountains, and extending south and east to the sources of all the rivers flowing into James's Bay.

The law entitling England to this has been stated not only by Vattel, but has been adopted as correct by the United States, and is recognized by the highest authorities on International Law in England—Dr. Twiss and Dr. Phillimore—as being the correct principle to apply in such cases.

If England acquired the territory claimed within the limits stated, it may for some purposes be necessary to consider what the Hudson's Bay Company took under their Charter. The Charter

will be found in Ont. Docts., pp. 29-37, and at p. 33 will be found what the King grants to the Hudson's Bay Co. under the name of "Rupert's Land." First is granted the sole trade and commerce of all those seas, bays, lakes, rivers, creeks, &c. Then the Company are created the absolute lords and proprietors of *the same territory, limits and places, &c., &c., in free and common socage,* with power to erect colonies and plantations, &c.

The Charter is very wide; and although it appears to have been conceded by the leading counsel in England (Ont. Docts., pp. 193 to 202) whose opinions were obtained that the Charter granting a monopoly to the Company to trade may have been void because not sanctioned by Parliament, yet that the *territorial grant is valid*, and the only difference in the opinions appears to be to the extent of territory covered by the grant.

In 1849, on an address of the House of Commons praying that Her Majesty would be graciously pleased to direct that means be taken to ascertain the legality of the powers in respect to TERRITORY, TRADE, TAXATION, and GOVERNMENT, which are, or have been, claimed by the Hudson's Bay Company, the Directors of the Company were requested to render their assistance in complying with the address of the House of Commons, which they did on the 13th of September, 1849, by enclosing to Earl Grey a statement as to their RIGHTS as to TERRITORY TRADE, &c., which will be found in full in Ont. Docts., pp. 288-9 and 290.

Annexed to this statement was a map showing the territory claimed by the Company as included within their Charter; and a copy of this map was likewise produced in 1857 to the Select Committee of the House of Commons, and is attached to the Report of that Committee. This map shows that on the south the Company claimed to the land's height, and on the west to the foot of the Rocky Mountains.

On 30th Oct., 1849, Earl Grey enclosed to the then law-officers of the Crown the statement and map furnished by the Company, requesting an opinion as to the rights of the Company.

The opinion furnished is as follows:—

Copy of a Letter from Sir John Jervis and Sir John Romilly to Earl Grey.

MY LORD,

Temple, January, 1850.

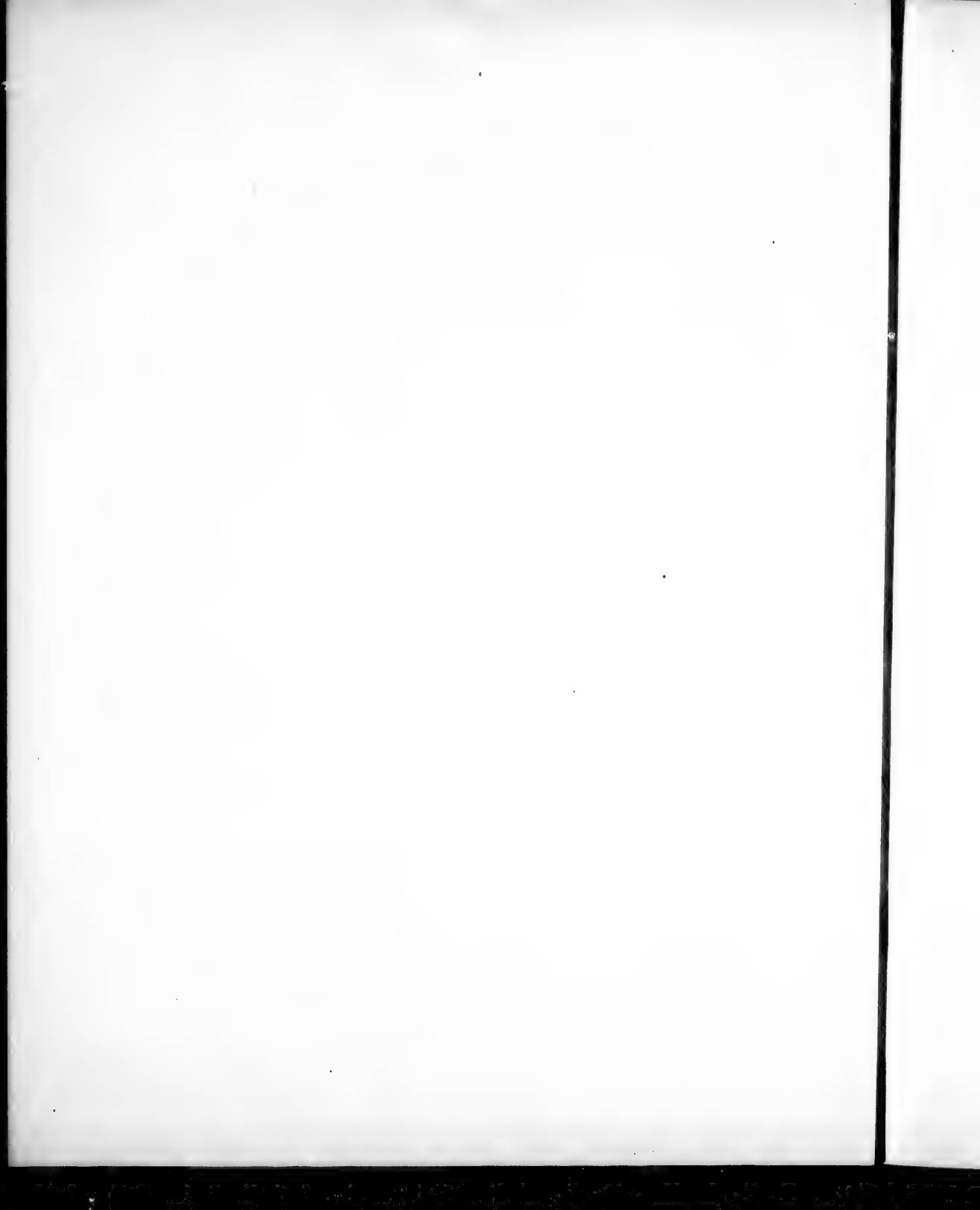
We were honored with your Lordship's commands contained in Mr. Hawes's letter of the 30th October last, in which he stated that he was directed by your Lordship to transmit to us the copy of a Resolution of the House of Commons, that an Address be presented to Her Majesty, praying that measures may be taken for ascertaining the legality of the powers which are claimed or exercised by the Hudson's Bay Company on the Continent of North America.

Mr. Hawes then stated that he was to enclose the copy of a letter from the Chairman of the Hudson's Bay Company, together with a statement and map, prepared under his direction, of the territories claimed by the Company in virtue of the Charter granted to them by King Charles the Second.

Mr. Hawes also sent the copy of a letter, dated the 30th September last, from Mr. A. K. Isbister, inquiring in what mode Her Majesty's Government intend to give effect to the Resolution of the House of Commons, and whether, in the event of any reference to a judicial tribunal, it will be necessary for the parties interested to appear by counsel or otherwise, or to furnish evidence, and, if so, of what nature.

Mr. Hawes concluded by stating that your Lordship requested that we would take these papers into our early consideration, and inform you whether we are of opinion that the rights claimed by the Company do properly belong to them. In the event of our entertaining a doubt on any point raised in these papers, Mr. Hawes was to request that we would advise your Lordship in what manner the opinion of a competent tribunal can be obtained on the subject.

In obedience to your Lordship's command, we have taken these papers into our consideration, and have the honor to report that, having regard to the powers in respect to territory,



trade, taxation, and government, claimed by the Hudson's Bay Company in the statements furnished to your Lordship by the Chairman of that Company, we are of opinion that the rights so claimed by the Company do properly belong to them.

Upon this subject we entertain no doubt; but as it will be more satisfactory to the complainants against the Company, to the promoters of the discussion in the House of Commons, and possibly to the Company themselves, if the questions are publicly argued and solemnly decided, we humbly advise your Lordship to refer these questions to a competent tribunal for consideration and decision, and to inform Mr. Ibister that he may appear as complainant, and the Company that they may be heard as respondents upon the argument. The proper mode of raising the question for discussion will, we presume, be for Mr. Ibister, or some other person, to embody in a Petition to Her Majesty the complaints urged against the Hudson's Bay Company; and such a Petition may be referred by Her Majesty either to the Judiciary Committee, under the 4th section of the Statute 3 and 4 Will. IV., c. 41, or to the Committee of Trade, as involving questions within their jurisdiction. The Judicial Committee, from its constitution, is the best fitted for the discussion of a case of this description, and we recommend that to that tribunal the proposed Petition should be referred.

(Papers relating to H. B. Co., presented to House of Commons, pp. 7-8.)

On 6th June, 1850, Earl Grey caused to be sent to Sir John Pelly a letter, from which the following extracts are taken:—

Extract of a Letter from *B. Hawes, Esq.*, to *Sir John Pelly, Bart.*, dated Downing street, 6th June, 1850.

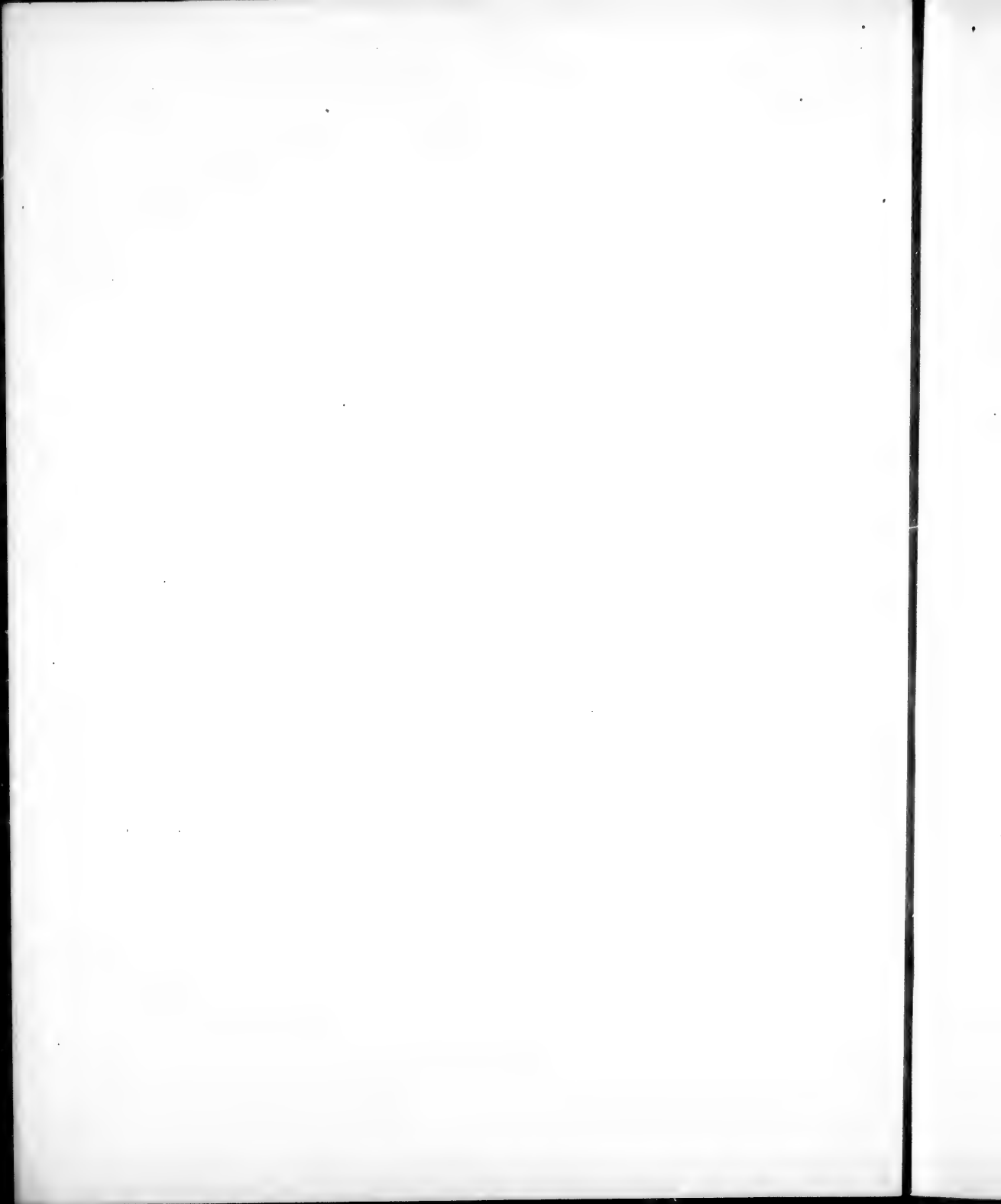
"With reference to your observation, 'that it would be of the utmost importance if the decision of the Privy Council on the rights and privileges of the Company were sent to Hudson's Bay by one of the ships appointed to sail on the 8th instant,' I am to remind you that the proceedings for the purpose of giving effect to the Resolution of the House of Commons of 5th July, 1849, have not led to any reference to the Privy Council, and that the question raised in that Resolution stands in the following position:—

"Steps having been taken, as you are aware, to obtain from the Hudson's Bay Company a statement of its claims, that statement was duly submitted to Her Majesty's Law Advisers, and Her Majesty's Government received from them a report that the claims of the Company were well founded. It was observed in that report that, with a view to the fuller satisfaction of the House of Commons, and the parties interested, it would be advisable to refer the inquiry to a competent tribunal, and that the proper method of raising a discussion upon it would be for some person to address a Petition to Her Majesty, which Petition might then be referred either to the Judicial Committee, or the Committee of Privy Council for Trade and Plantations.

"Such a Petition was, therefore, essential to the complete prosecution of the inquiry; Lord Grey accordingly gave to certain parties in this country, who had taken an interest in the condition of the inhabitants of the Hudson's Bay Company's Territories, and had questioned the validity of the Company's Charter, an opportunity to prefer the necessary Petition if they were so disposed; but, for reasons which it is unnecessary to repeat, they respectively declined to do so. Lord Grey having, therefore, on behalf of Her Majesty's Government, adopted the most effectual means open to him for answering the requirements of the Address, has been obliged, in the absence of any parties prepared to contest the rights claimed by the Company, to assume the opinion of the Law-Officers of the Crown in their favor to be well founded."

(Papers relating to H. B. Co., presented to House of Commons, p. 15.)

The law-officers of the Crown—Sir Richard Bethell, Attorney-General, and Sir Henry S. Keating, Solicitor-General—gave an opinion in 1857 (*Ont. Docts.*, pp. 200-1), "That the validity and construction of the Hudson's Bay Company's Charter cannot be considered apart from the



enjoyment which has been had under it during nearly two centuries, and the recognition made of the rights of the Company in various Acts both of the Government and the Legislature."

"We beg leave to state, in answer to the questions submitted to us, that in our opinion the Crown could not now with justice raise the question of the general validity of the Charter; but that, on every legal principle, the Company's territorial ownership of the lands and the rights necessarily incidental thereto (as, for example, the right of excluding from their territory persons acting in violation of their regulations) ought to be deemed to be valid."

"The remaining subject for consideration is the question of the geographical extent of the territory granted by the Charter, and whether its boundaries can in any and what manner be ascertained. In the case of grants of considerable age, such as this Charter, when the words, as is often the case, are indefinite or ambiguous, the rule is that they are construed by usage and enjoyment, including in these latter terms *the assertion of ownership by the Company on important public occasions, such as the Treaties of Ryswick and Utrecht, and again in 1750.*"

Now, what were the Hudson's Bay Company claiming as their territorial rights at the time of the Treaty of Ryswick (1697) and after the Treaty of Utrecht (1713), and also in 1750?

By the 7th and 8th Articles of the Treaty of Ryswick certain things were to be done—(1) the Treaty was to be ratified, and (2) after the ratification Commissioners were to be appointed who were "to examine and determine the rights and pretensions which either of the said Kings had to the places situate in Hudson's Bay." (Ont. Docts., pp. 15 and 16.) And although Commissioners were appointed, and although claims were at different times advanced by the Hudson's Bay Company (as will presently be stated), nothing was done by the Commissioners to determine such rights and pretensions.

"After the Commissioners have determined the differences and disputes, the Articles the said Commissioners shall agree to shall be ratified by both Kings, and shall have the same force and vigor as if they were inserted word for word in the present Treaty." (Treaty of Ryswick, Art. 8, Chalmers' Treaties, Vol. I., p. 335.)

The English and French Governments went on negotiating, under the Treaty, until 1702, when the war of succession broke out and all negotiations were at an end.

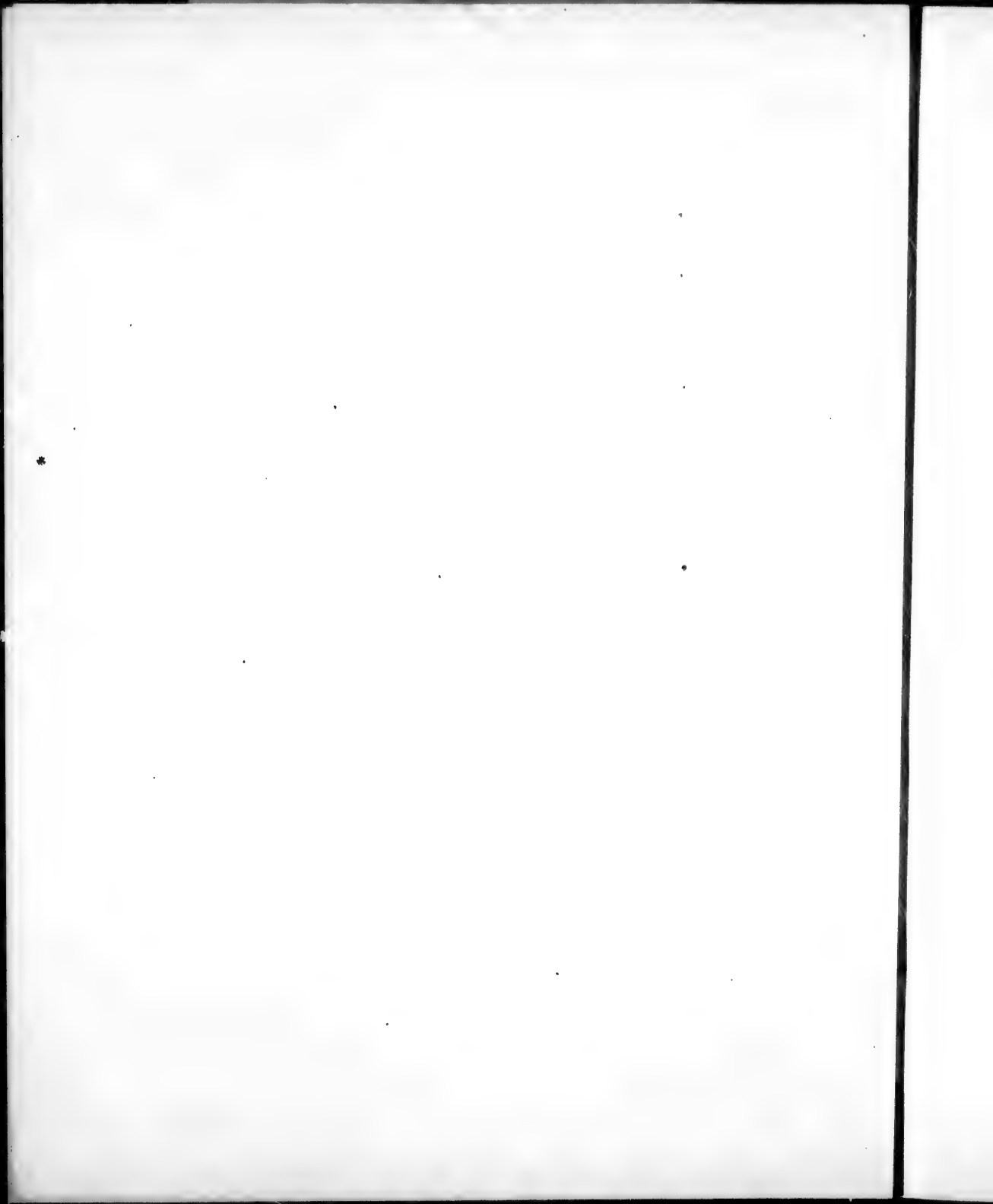
It has been stated, and urged, as a ground against the latter pretensions of the Hudson's Bay Co. that in July, 1700, they were willing to contract their limits. While willing to do this for the purpose of effecting a settlement, and only on condition of their not being able to obtain "the whole Straits and Bay which of right belongs to them." (Ont. Docts., p. 123.)

Nothing was done under this, and the Hudson's Bay Co. were again addressed by the Lords of Trade and Plantations in January, 1701, when they again insist on their rights to the whole Bay and Straits, but are willing to forego their rights to a certain extent if by that means they can secure a settlement. "But should the French refuse the limits now proposed by the Company, the Company think themselves not bound by this, or any former concessions of the like nature, but must, as they have always done, insist upon their prior and undoubted right to the whole Bay and Straits of Hudson which the French never yet would strictly dispute, or suffer to be examined into (as knowing the weakness of their claim), though the first step in the said Article of Ryswick directs the doing of it." (Ont. Docts., pp. 124-5.)

In May, 1709, the Company were requested by the Lords of Trade and Plantation to send an account of the encroachments of the French on Her Majesty's Dominion in America within the limits of the Company's Charter. To which the Company replied, setting forth their right and title, and praying restitution. (Mills, pp. 152-3.)

A further petition was sent by the Hudson's Bay Company to the Queen in 1711. (Ont. Docts., pp. 126-7.)

Nothing was done by the Commissioners towards the determination of the differences and disputes up to the time, when Count de Torey, on behalf of France, made a proposition, in April,



1711, with a view of bringing about a general peace between England and France, and while these negotiations were in progress, and on 7th February, 1712, the Hudson's Bay Co. set forth what they desired should be stipulated for them at the ensuing treaty of peace. (Ont. Docts., pp. 128-9.)

For reasons thought very cogent, it is not supposed the question of *post liminiy*. will require much, if any, consideration; but as no point should be overlooked which ought, or even might, be considered in the case, the subject is therefore shortly considered.

Vattel, Book III., Cap. 14. Sec. 20, defines the right of *post liminiy*. to be "that in virtue of which persons and things taken by the enemy are restored to their former estate on coming again into the power of the nation to which they belonged."

"The Sovereign is bound to protect the persons and property of his subjects, and to defend them against the enemy. When, therefore, a subject, or any part of his property, has fallen into the enemy's possession, should any fortunate event bring them back again into the Sovereign's power, it is undoubtedly his duty to restore them to their former condition—to re-establish the persons in all their rights and obligations—to give back the effects to the owners—in a word, to replace everything on the same footing on which it stood previous to the enemy's capture. (Ibid., Sec. 205.)

"Provinces, towns and lands, which the enemy restores by the treaty of peace, are certainly entitled to the right of *post liminium*; for the Sovereign, in whatever manner he recovers them, is bound to restore them to their former condition, as soon as he regains possession of them. (Ibid., Sec. 205.) The enemy in giving back a town at the peace renounces the right he had acquired by arms. It is just the same as if he had never taken it; and the transaction furnishes no reason which can justify the Sovereign in refusing to reinstate such town in the possession of all her rights, and restore her to her former condition." (Ibid., Sec. 214.)

It is submitted, however, that, as between the Dominion and Province of Ontario, the question whether the Hudson's Bay Company were entitled to demand the right of *post liminium* is of no consequence whatever.

The late Chief Justice Draper, when acting as agent for the Province of Canada, delivered to the House of Commons Committee, on the 28th of May, 1857, a paper relative to the boundaries, wherein it is stated,

"The 8th article of the Treaty of Ryswick, shows that the French at that time set up a claim of right to Hudson's Bay, though that claim was abandoned at the peace of Utrecht, and was never set up afterwards." (Ont. Docts., p. 240.)

Lord Dartmouth's letter of the 27th May, 1713 (Ont. Docts., p. 129), enclosing the petition of the Hudson's Bay Company, shows what was the design in not accepting an "Act of Cession" from the French King; and Her Majesty the Queen "insisted only upon an order from the French Court for delivering possession; by this means the title of the Company is acknowledged and they will come into the immediate enjoyment of their property, without further trouble."

The Sections of Treaty of Utrecht having any bearing upon the question are the 10th and 15th, to be found in Ont. Docts., pp. 16 and 17.

Under Sec. 10 the King of France was "to restore to the Queen of Great Britain, to be possessed in full right forever, the Bay and Straits of Hudson, together with all lands, seas, coasts, rivers, and places situate in the said Bay and Straits, and which belong thereunto; no tracts of land or of sea being excepted which are at present possessed by the subjects of France."
* * * * * "The same Commissaries shall also have orders to describe and settle in like manner the boundaries between the other British and French Colonies in those parts."

In the wording of the 10th Article a great deal of discussion arose as to whether the word "restore" or the word "cede" should be used. Count de Torey, in January, 1713, says: "The Plenipotentiaries now make no difference between places 'ceded' and places 'restored.'" (Boling-

broke's Correspondence, Vol. III., p. 601.) But in March, 1713, he says that the truth is so evident that the Plenipotentiaries of Great Britain at Utrecht always make a distinction between places that should be "ceded" and those that should be "restored." (Bolingbroke's Correspondence, Vol. III., p. 605.)

Great Britain was contending that as France had dispossessed her of Hudson's Bay Territories the French should "restore" them, while the French desired to use the word "cede," as if the territories had belonged to the French, and they were for the first time ceding them to Great Britain. The word "restore" was used, and it is important to examine the original text of the Treaty, which is in Latin. The words used in that Article, "*spectantibus ad eadem*," show clearly that France was to restore to England all the lands looking towards the Hudson's Bay: in other words, the whole water-shed of the waters running into the Hudson's Bay.

The first part of the 10th Section does away with any exception, and left nothing for the French to hold possession of in Hudson's Bay.

Mr. Mills, at p. 159 of his Report, after quoting the portion of the 10th Section above referred to, says: "The words of the Treaty just quoted and the attendant circumstances show that what was claimed by England and yielded by France was the Bay and the country upon its margin. Nevertheless, the language of the Treaty *did not make it impossible for England, if she were so disposed, to insist upon the possession of the whole country to the land's height.* France, too, consented with reluctance to the use of the word 'restoration' instead of 'cession.'"

The Treaty not only made it possible for England to insist upon the possession of the whole country to the land's height, but from the very moment Commissaries were appointed as provided by the Treaty she always insisted that she was entitled to the whole country, and it will be apparent that France assented to this contention as being the correct interpretation of the Treaty.

Although Commissaries were appointed as provided by the Treaty, and notwithstanding the Commissaries failed to define the boundaries between the territories of each of the Governments, it was in some manner assumed that the boundary had been settled by the 49th parallel; and this was looked upon by the Americans and by the English themselves as being the southern boundary of the Hudson's Bay Company's Territory. And we find that in the discussions which took place in regard to the boundary line from the north-west angle of the Lake of the Woods to the Rocky Mountains, the United States asserting on the one hand and Great Britain not denying on the other that the 49th parallel was the boundary between their respective countries, because it was the southern boundary of the Hudson's Bay.

"From the coast of Labrador to a certain point north of Lake Superior those limits were fixed according to certain metes and bounds, and from that point the line of demarcation was agreed to extend indefinitely due west along the 49th parallel of north latitude. It was in conformity with that arrangement that the United States did claim that parallel as the northern boundary of Louisiana." (Grenshaw's Oregon, 2nd ed., p. 460.)

Whether a boundary was ever agreed upon, or whether it was merely assumed that the boundary above stated had been assented to, cannot now be of much importance, as in 1760 the Marquis de Vaudreuil did not pretend that the Canada of the French extended in a north-westerly direction beyond the Red Lake.

On the 4th August, 1714, the Hudson's Bay Company sent a memorandum to the Lords Commissioners of Trade and Plantations, accompanied by a map in which they claimed that the eastern boundary should be a line running from Grimington's Island through Lake Wiscosinke or Mistassinnie, and from the said lake by a line run south-westward into 49 degrees north latitude, *as by the red line may more particularly appear, and that that latitude be the limit*; that the French do not come to the north of it nor the English to the south of it. (Ont. Docts., pp. 131-2.)

When, in 1719, Commissaries were appointed the instructions given to Mr. Pultney and Col. Bladen, the British Commissaries, were explicit to claim to the 49th of north latitude where

another line was to begin and extend westward upon the 49th of north latitude, over which said lines the French were to be prohibited from passing. (Ont. Docts., p. 362.)

In order that there might be no mistaking the full extent of the demand of the British Government, and to show that under the Treaty, England was claiming the whole territory northward to the height of land and westward to the Rocky Mountains, the English Commissaries in 1719 sent to the French Commissaries a memoir on the subject of the boundary, in which they set forth that "the French *since* the Treaty of Utrecht had made a settlement at the source of the River Albany, the Commissaries of His Britannic Majesty insist that the French shall quit the said settlement, and that the Fort, if there be any such building, shall be given up to the Company of English merchants trading in Hudson's Bay aforesaid."

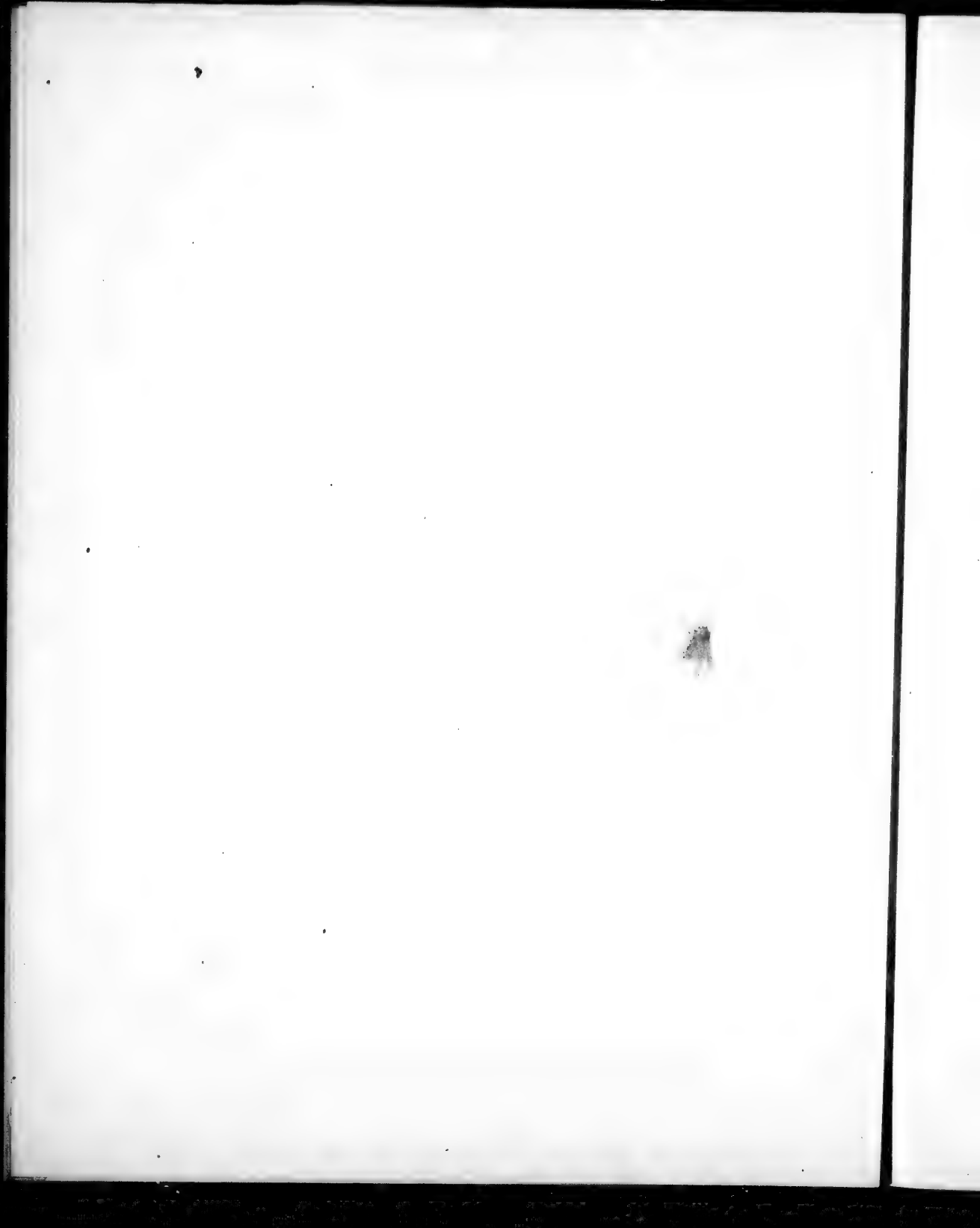
"The said Commissaries further demand that the subjects of His Most Christian Majesty *shall not build forts or found settlements upon any of the rivers which empty into Hudson's Bay under any pretext whatsoever, and that the stream and the entire navigation of the said rivers shall be left free to the Company of English merchants trading into Hudson's Bay and to such Indians as wish to traffic with them.*" (Ont. Docts., p. 365.)

Sir Travers Twiss, says:—

"The object of the 10th Article of the Treaty of Utrecht was to secure to the Hudson's Bay Company the restoration of the forts and other possessions of which they had been deprived at various times by French expeditions from Canada, and of which some had been yielded to France by the 7th Article of the Treaty of Ryswick. By this latter Treaty Louis XIV. had at last recognized William III. as King of Great Britain and Ireland; and William, in return, had consented that the principle of *uti possidetis* should be the basis of the negotiations between the two Crowns. By the 10th Article, however, of the Treaty of Utrecht, the French King agreed to restore to the Queen (Anne) of Great Britain, "to be possessed in full right forever, the Bay and Straits of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the said Bay and Straits, and which belong thereto; no tracts of land or sea being excepted which are at present possessed by the subjects of France." The only question, therefore, for Commissaries to settle were the limits of the Bay and Straits of Hudson, *coastwards*, on the side of the French Province of Canada, as all the country drained by streams entering into the Bay and Straits of Hudson were, by the terms of the Treaty, recognized to be part of the possessions of Great Britain."

"If the coast boundary, therefore, was once understood by the parties, the head waters of the streams that empty themselves into the Bay and Straits of Hudson indicate the line which at once satisfied the other conditions of the treaty. Such a line, if commenced at the eastern extremity of the Straits of Hudson, would have swept along through the sources of the streams flowing into the Lake Mistassinnie and Abbitibis, the Rainy Lake, in 48° 30', which empties itself by the Rainy River into the Lake of the Woods, the Red Lake, and Lake Travers."

"This last lake would have been the extreme southern limit in about 45° 40', whence the line would have wound upward to the north-west, pursuing a serpentine course, and resting with its extremity upon the Rocky Mountains, in about the 48th parallel of latitude. Such would have been the boundary line between the French possessions and the Hudson's Bay district; and so we find that in the limits of Canada, assigned by the Marquis de Vaudreuil himself, when he surrendered the Province to Sir J. Amherst, the Red Lake is the apex of the Province of Canada, or the point of departure from which, on the one side, the line is drawn to Lake Superior; on the other, 'follows a serpentine course southward to the River Oubache, or Wabash, and along it to the junction with the Ohio.' This fact was insisted upon by the British Government in their answer to the ultimatum of France, sent in on the 1st of September, 1761, and the map which was presented on that occasion by Mr. Stanley, the British Minister, embodying those limits, was assented to in the French memorial of the 9th of September." (Historical Memorial of the Negotiations of



France and England from March 26th to Sept. 20th, 1761. Published at Paris by authority). (Twiss' Oregon boundary, pp. 209-211).

"By the Treaty of Utrecht, the British possessions to the north-west of Canada were acknowledged to extend to the head-waters of the rivers emptying themselves into the Bay of Hudson; by the Treaty of Paris they were united to the British possessions on the Atlantic by the cession of Canada and all her dependencies; and France contracted her dominions within the right bank of the Mississippi. That France did not retain any territory after the Treaty to the north-west of the sources of the Mississippi will be obvious, when it is kept in mind that the sources of the Mississippi are in $47^{\circ} 35'$, whilst the sources of the Red River which flows through Lake Winnipeg, and ultimately finds its way by the Nelson River into the Bay of Hudson, are in Lake Travers, in about $45^{\circ} 40'$." (Twiss' Oregon, p. 226.)

It has not been thought necessary to refer to the numerous maps described in the Ontario Documents, as, unless a map has been made use of in connection with a treaty, or a boundary has been defined thereon, but little reliance can be placed upon it. Sir Travis Twiss says: "The claim, however, to the westwardly extension of New France to the Pacific Ocean requires some better evidence than the maps of French geographers. A map can furnish no proof of territorial title: it may illustrate a claim, but it cannot prove it. The proof must be derived from facts which the law of nations recognizes as founding a title to territory. Maps, as such, that is, when they have not had a special character attached to them by treaties, merely represent the *opinions of the geographers* who have constructed them, which opinions are frequently founded on fictitious or erroneous statements: *e.g.*, the map of the discoveries of North America by Ph. Buache and J. N. De'Lisle in 1750, in which portions of the west coast of America were delineated in accordance with De Fonte's story, and the maps of North-west America at the end of the seventeenth and beginning of the eighteenth centuries, which represent California as lately ascertained to be an island. (Twiss' Oregon, pp. 305-6.)

When new Commissaries were appointed in 1750, the Lords of Trade and Plantations requested the Hudson's Bay Company to furnish a memorandum showing the limits claimed, which was done on the 3rd of October in that year, and is substantially as claimed by them in 1719. (Mills, pp. 176-7.)

It were well to consider what territory was comprised within the limits of Louisiana, as this will prove a help to arriving at a proper conclusion as to what England claimed as being comprised in "Canada," or "New France."

According to extracts (Ont. Docts., pp. 41-2) copied from the Charter of Louis XIV. to Mr Crozat, Sept., 1712, it will be seen that Louisiana "was the country watered by the Mississippi and its tributary streams from the sea-shore to the Illinois," *i.e.*, the Illinois River was the northern boundary of Louisiana according to this "authoritative document of the French Crown." By the same public document all the rest of the French possessions were united under the Government of New France. (Twiss' Oregon, pp. 219-220.)

In the course of the negotiations respecting the limits of the Provinces of Canada and Louisiana the Marquis de Vaudreuil, who signed the surrender, published his own account of what passed between Sir J. Amherst and himself, of which he considered the English account to be incorrect. "On the officer showing me a map which he had in his hand I told him the limits were not just, and verbally mentioned others extending Louisiana on one side to the carrying-place of the Miamis, *which is the height of the lands whose rivers run into the Ouabache; and on the other to the head of the river of the Illinois.*" (Annual Register, 1761, p. 268.) Even thus, then, all to the north of the Illinois was admitted to be Canada." (Twiss' Oregon, pp. 220-221.)

What took place at the various Conferences respecting the limits of Canada has been procured from the records of the Foreign Office.

On the 18th August, 1761, M. de Bussy, the French Minister at London, furnished to Mr.

Pitt a memorandum upon the limits of Louisiana, which bore upon the limits of Canada, and ran thus:

"Sur les limites de la Louisiane. Pour fixer les limites de la Louisiane du côté des colonies Angloises et du Canada, on tirera une Ligne qui s'étendra depuis Rio Pereido entre la Baye de la Mobile et celle de Pensacola, en passant par le Fort Toulouse chez les Alimabous, et qui, se prolongeant par la point occidentale du Lac Erié enfermera la Rivière des Miamis, et par l'extrémité orientale du Lac Huron, ira aboutir à la hauteur des Terres du côté de la Baye d' Hudson vers le Lac de l'Abitibis, d'où la Ligne sera continuée de l'Est à l'Orient jusques et compris le Lac Superieur." (Pub. Rec., Off. Vol. 483.)

Instructions, however, accompanied by an ultimatum, were transmitted under date of the 27th August, 1761, to Mr. Stanley, in which it was laid down that these limits could not be acceded to; and Mr. Pitt, in alluding to the conduct of France, stated that among the reasons whereby British confidence had been shaken was "the claiming, as Louisiana, with an effrontery unparalleled, vast regions which the Marquis de Vaudreuil had surrendered to General Amherst as Canada, and defined himself, with his own hand, as comprehended in the government of that Province where he commanded," and Mr. Pitt gave the following definition of the boundaries of Canada, as set forth by M. de Vaudreuil:—

"Le Canada, selon la Ligne de ses limites tracée par le Marquis de Vaudreuil lui-même, quand ce Gouverneur-Général a rendu, par capitulation, la dite Province au Général Britannique le Chevalier Amherst, comprend, d'un côté, les Lacs Huron, Michigan et Superieur, et la dite Ligne, tirée depuis Lac Rouge embrasse par un cours tortueux, la Rivière Onabache (Abash) jusqu'à sa jonction avec l'Ohio, et de là se prolonge le long de cette dernière Rivière inclusivement, jusques à son confluent dans la Mississipi;" and on this definition of the limits of Canada its cession was claimed—a copy of M. de Vaudreuil's map being sent to Mr. Stanley for reference, together with an extract of a letter from General Amherst, dated 4th October, 1760, bearing upon that subject. (Pub. Rec., Off. Vol. 483.)

Annexed will be found a copy of that map of M. de Vaudreuil to which Mr. Pitt referred, which has been made from the original enclosed by General Amherst in his despatch of 4th Oct., 1760, from which document also the following extracts have been taken:—

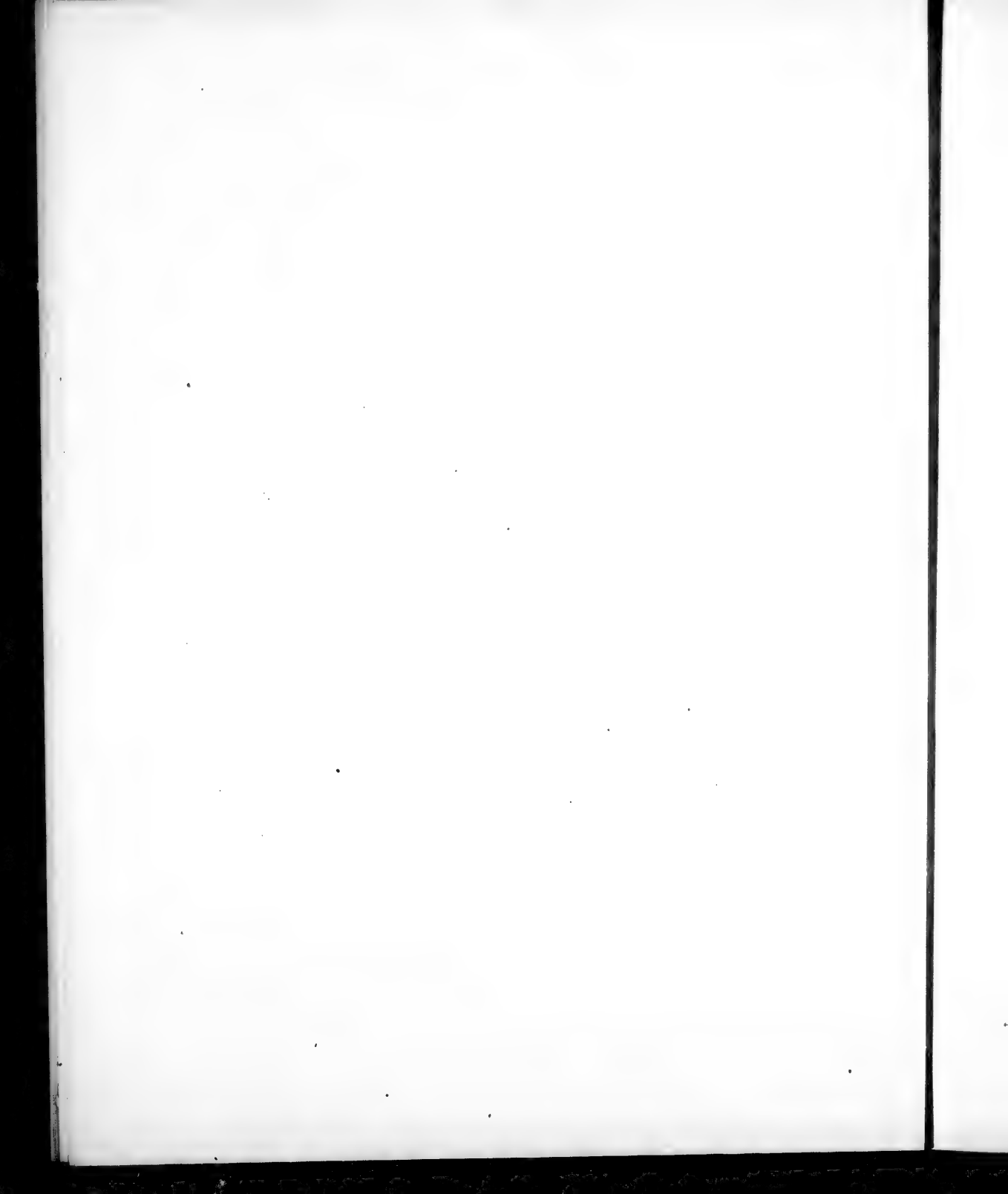
"The Government of Canada includes Lakes Huron, Michigan and Superior, as you will see by the enclosed sketch, the red line being marked by the Marquis de Vaudreuil."

"The Government of Quebec begins with Troudines on the north-west and de Chaillon on the south-east, and takes in all the parishes from them down the River St. Lawrence." (Pub. Rec., Off. Vol. 94, Ama and W. Indies.)

It is further recorded on the 2nd September, 1761, the Marquis de Vaudreuil's map was shown to the Duc de Choiseul by Mr. Stanley, and that the bounds of Canada were agreed upon as therein stated. This fact is further substantiated by a passage in Mr. Stanley's despatch of the 4th of that month, which runs as follows:—

"The Duc de Choiseul complained that the bounds of Canada were laid down very unfavorably to France, in the description which your memorial contains, alledging (sic) that there had been disputes between the Marquis de Vaudreuil and the Governor of Louisiana with regard to the limits of their two Provinces, wherein the former, being the more able and the more active, had greatly enlarged his jurisdiction; he added, however, that though many such objections might be made, it had been the intention of the King, his master, to make the most full and compleat cession of Canada, and that he consented in his name to those limits. I then produced the map you sent me, and it was agreed that this Province should remain to Great Britain as it is there delineated." (Minutes of a Conference at Paris, Sept. 2nd, 1761. Pub. Rec., Off. Vol. 483, France.)

The last Mémoire of France to England in these negotiations is dated 9th Sept., 1761, and was delivered by M. de Bussy to Mr. Pitt on the 14th.



The first article fully confirms the acceptance of France of the de Vaudreuil map, *and states as follows:—

"Le Roi, a dit dans son premier mémoire de propositions et dans son ultimatum, qu'il cederait et garantirait à l'Angleterre la possession du Canada dans la forme la plus étendue : Sa Majesté persiste dans cette offre : et sans disputer sur la ligne des limites, tracé dans une carte présentée par M. Stanley, comme cette ligne demandée par l'Angleterre, est sans doute la forme la plus étendue que l'on puisse donner à la cession le Roi veut bien l'accorder." (*Mémoire Historique sur la Négotiation de la France et de l'Angleterre, 1761, p. 52. F. O. Lib. 4to, No. 434.*)

Then came the Treaty of Paris, concluded on 10th February, 1763, by which the Canada of the French was ceded to Great Britain.

By the 7th section of this Treaty, "It is agreed that for the future the confines between the Dominions of His Britannic Majesty and those of His Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the middle of the River Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of this river and the lakes Maurepas and Pontchartrain to the sea." (*Ont. Doc., pp. 18-19.*)

As the source of the River Mississippi was Red Lake, and as it was from that point that the Marquis de Vaudreuil directed the red line to be drawn, there can be no difficulty in coming to a conclusion as to what was included within the bounds of the "Canada" of the French.

Now, the proclamation of the King on 7th October, 1763, created four separate Governments: viz.: Quebec, East Florida, West Florida and Grenada.

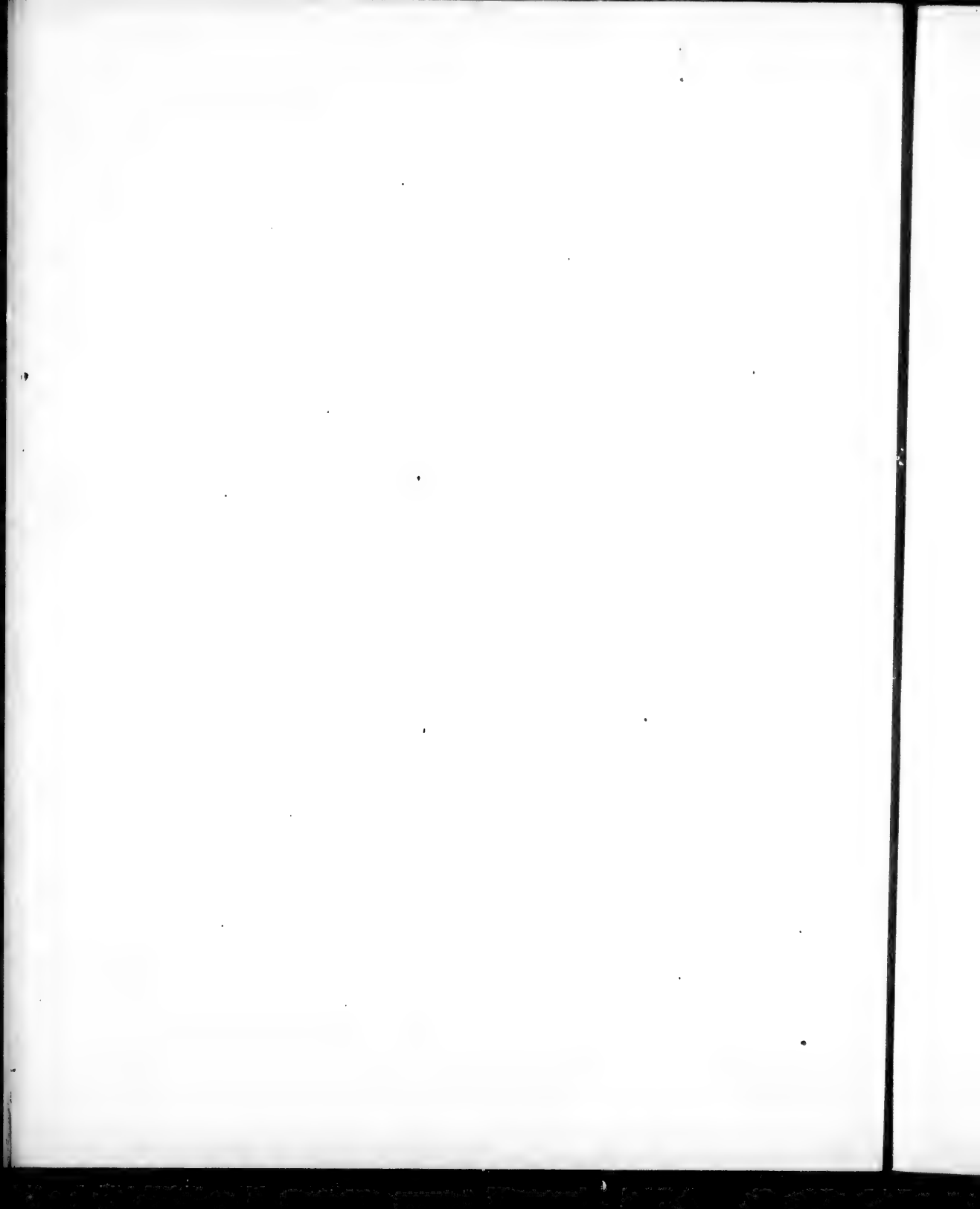
All the lands not within the limits of the said Governments, and not within the limits of the territory granted to the Hudson's Bay, were for the present reserved for the protection and dominion of the Indians. (*Ont. Docs., p. 26.*)

QUEBEC ACT, 1774.

When the Quebec Act of 1774 was introduced it was designed to extend the bounds of the Province of Quebec far beyond those created by the Proclamation of the King, issued in October, 1763. By the Act, as originally introduced, it was evidently intended to include in the Province of Quebec "all the territories, islands and countries heretofore a part of the territory of *Canada* in *North America extending southward to the banks of the Mississippi* and northward to the southern boundary of the territory granted to the Merchant Adventurers of England trading to Hudson's Bay, and which said territories, islands and countries are not within the limits of the other British Colonies as allowed and confirmed by the Crown, or which have since the 10th February, 1763, been made a part and parcel of the Province of Newfoundland." (*Mills, pp. 77-8.*)

Now, in the Act as passed the words "*heretofore a part of the territory of Canada*" are left out, and the Act included "all the territories, islands and countries in North America belonging to the Crown of Great Britain," between certain defined limits along the western boundary of the then Province of Pennsylvania until it strike the River Ohio; and along the bank of the said river westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading in Hudson's Bay; and all the territories, islands and countries which have since the 10th February, 1763, been made part of the Government of Newfoundland, by, and they are hereby, during Her Majesty's pleasure, annexed to and made part and parcel of the Province of Quebec, as created and established by the said Royal Proclamation of 7th day of October, 1763. (*Ont. Docs., p. 3.*)

* Yet on the 30th Nov., weeks after the cessation of these negotiations, M. de Vaudreuil addressed a letter to the Duc de Choiseul, which was published, as stated in the Annual Register of 1761, "to quiet the minds of the people," and in which the Marquis stated that what he was charged with by the English as regards the limits of Canada was entirely false and groundless, and that nothing passed in writing on that head, nor was any line drawn on any map. *An Reg., 1761, pp. 267-8.* (See M. de Vaudreuil's letter, *Ont. Docs., p. 159.*)



On reading this description it will be seen that the east bank of the Mississippi could not have been intended as the western limit.

Whenever the bank of a river or lake is created a boundary, the Act expressly states such to be the case, as "the eastern bank of the River Connecticut," "the eastern bank of the River St. Lawrence," "thence along the eastern and south-eastern bank of Lake Erie," and "along the bank of the said river (Ohio) until it strikes the Mississippi." Now, when the River Mississippi is reached the description does *not* proceed "along the bank of said river," as in the other descriptions, but describes the remaining limit as "northward to the southern boundary of the territory granted to the Merchant Adventurers of England."

It is said that the word "northward" in the Act cannot mean "north," and that, therefore a line drawn north from the junction of the Ohio and Mississippi rivers to the southern boundary of the Hudson's Bay Company's lands would not conform to the description in the Act.

The meaning of the expression "northward," as used in this Act, received judicial interpretation in the year 1818, on the occasion of the trial of Charles de Reinhard for murder committed at the Dalles; and also during the trial of Archibald McLennan, in the same year, for a like offence.

The Judges of the Court of Queen's Bench, in Lower Canada, in giving judgment in these cases (Ont. Docts., pp. 226-7-8) were clearly of opinion that the western limit of Upper Canada was a line drawn due north from the junction of the Ohio and Mississippi rivers.

In the Treaty between Great Britain and the United States, in 1846, the term "westward" was used, and it was interpreted to mean "due west." (U. S. Treaties and Conventions, p. 375).

Because the Commission which issued to Sir Guy Carleton in 1774 extended the boundary of the Province "along the eastern bank of the Mississippi river to the southern boundary of the territory granted to the Hudson's Bay Company," it is asserted that the Commission should govern.

The fact of a Commission having been issued, with this extension not authorized, cannot be made to extend the boundaries created by the Act. These Commissions, being mere instructions to the Governor-General, can have no effect in altering territorial boundaries.

The Commission to Governor Andros, of Connecticut, gave him authority to the South Sea.

Lord Elgin's Commission as Governor-General, issued in 1840, apparently gave him jurisdiction to the shore of Hudson's Bay: but it never was claimed or pretended that the Commission extended the boundaries of Canada to the shore of that Bay. (For Commission, *vide* Ont. Docts. pp. 51-52).

1791.

THE CONSTITUTIONAL ACT.

What is known as the Constitutional Act of 1791 (31 Geo. III., cap. 31) was passed to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled "An Act for making more effectual provision for the government of the Province of Quebec, in North America," and to make further provision for the government of the said Province.

"Whereas, an Act was passed in the fourteenth year of the reign of his present Majesty, entitled 'An Act for making more effectual provision for the government of the Province of Quebec, in North America;' and whereas the said Act is in many respects inapplicable to the present condition and circumstances of the said Province; and whereas it is expedient and necessary that further provision should now be made for the good government and prosperity thereof: may it therefore please your most excellent Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that so much of the said Act as in any manner relates to the appointment of a Council for the affairs of the said Province of Quebec, or to the power given by the said Act to the said Council,

or to the major part of them, to make ordinances for the peace, welfare, and good government of the said Province, with the consent of His Majesty's Governor, Lieutenant-Governor, or Commander-in-chief for the time being, shall be and the same is hereby repealed.

"And whereas His Majesty has been pleased to signify, by his message to both Houses of Parliament, his royal intention to divide his Province of Quebec into two separate Provinces, to be called the Province of Upper Canada and the Province of Lower Canada, &c." (Ont. Docts., p. 4.)

The Proclamation of November, 1791 (Ont. Docts. p. 27), declares that by an Order-in-Council of August it was ordered that the Province of Quebec should be divided into two distinct Provinces. But it is argued that this Proclamation annexed to Upper Canada territories not included in the Province of Quebec. This argument is based upon the use of the word "Canada" at the end of the first paragraph of the Proclamation.

It is stated the 14th Geo. III. "is in many respects inapplicable to the present condition and circumstances of the said Province." To what Province is it inapplicable? Why, to the Province of Quebec. The Act says the intention of the King was "*to divide his Province of Quebec into two separate Provinces.*"

His Majesty, on the 24th day of August, 1791, "was pleased by and with the advice and consent of his Privy Council to order that the Province of Quebec be divided into two distinct Provinces, to be called the Province of Upper Canada and the Province of Lower Canada, by separating the said two Provinces according to the line of division inserted in the said order." (Ont. Docts., p. 389.)

The Act of Parliament was that alone upon which the Order-in-Council could be based or the Proclamation issued; and it is quite evident that neither the Order-in-Council nor the proclamation intended to do more than the Act made provision for, *i. e.*, to divide the Province of Quebec.

The construction put upon this Act by the Court of Queen's Bench in Lower Canada, in *De Reinhard's* case and in *M. Lennan's* case (Ont. Docts., pp. 226-7-8), was that "Upper Canada could include only that part of the Province so divided as was not contained in Lower Canada, but it could not extend beyond those limits which constituted the Province of Quebec."

In the Commission issued to Lord Dorchester, September 12, 1791, as Captain-General and General-in-Chief of the Province of Upper Canada and Lower Canada (wherein the Order-in-Council of 19th August, 1791, is recited), it states the intention to divide the Province of Quebec into two separate Provinces, "the Province of Upper Canada to comprehend all said lands, territories and islands lying westward of the said line of division as were part of our said Province of Quebec." (Ont. Docts., p. 48.)

The Commission issued in 1794 to Henry Caldwell, Esquire, Receiver-General of the Province of Lower Canada, contains a boundary description of Upper Canada similar to that in the Commission of Lord Dorchester. (Ont. Docts., pp. 389-390.)

The ten Commissions issued to the Governors-General of the Provinces of Upper and Lower Canada between December, 1796, and 1st July, 1835, contain boundary-line descriptions similar to that of Lord Dorchester in September, 1791.

On 13th December, 1838, a Commission was issued to Sir John Colborne as Governor-in-Chief of the Province of Upper Canada, in which, after describing the other boundaries of the Province, it proceeds: "On the west by the Channel of Detroit, Lake St. Clair, up the River St. Clair, Lake Huron, the west shore of Drummond Island, that of St. Joseph and Sugar Island, thence into Lake Superior." (Ont. Docts., p. 390.)

The Commission to the Right Hon. Sir Charles Paulett Thompson, dated 6th September, 1839, contains boundary descriptions similar to above. (Ibid, p. 390.)

29TH AUGUST, 1840.

The Act of Union (Impl. Act 3, 4 Vic., cap. 35) was passed to make "provision for the good

government of the Province of Upper Canada and Lower Canada, * * * * which, after the passing of this Act, shall form and be one Province under the name of the Province of Canada." (Ont. Docts., p. 10.)

After the passing of the Union Act, and on 29th August, 1840, a Commission was issued to Lord Sydenham as Governor-in-Chief of the Province of *Canada*. The Commission gives the western boundary of the united Provinces, as in the Commission to Sir John Colborne. (Ont. Docts., p. 51.)

The Commission to Lord Metcalf in February, 1843, and that to Earl Cathcart in March, 1846, and the one issued to Lord Elgin on 1st October, 1846, contain boundary-line descriptions of Upper Canada similar to that issued to Lord Sydenham in 1840.

It will be seen that, between December, 1838, when Sir John Colborne was appointed Governor-General, until 1852 or 1853, when Lord Elgin's term as representative of Her Majesty expired, the British Government understood and treated the western boundary of Upper Canada as being on the shore of Lake Superior; and it is fair to infer that the Imperial authorities were not ignorant that a line drawn north from the junction of the Ohio and Mississippi would strike the shore of Lake Superior, and they no doubt intended that where the line so struck should be the limit of the jurisdiction of the Governors-General, and consequently the westerly limit of the Province of Upper Canada.

Then, in order to reach offenders for crimes committed in the Indian territory (reserved for the Indians by the Proclamation of October, 1763), the Act of 43 Geo. III., cap. 138 (11th August, 1803), was passed. (Ont. Docts., pp. 4-5.)

As doubts existed as to whether the provisions of 43 Geo. III., cap. 138, extended to the Hudson's Bay Territory, the Acts 1 and 2 Geo. IV., cap. 66 (2nd July, 1821), was passed, including the Hudson's Bay Company's *lands and territories heretofore* granted to the Hudson's Bay Company, and under the fourteenth section of that Act the rights and privileges of the Hudson's Bay Company are to remain in full force, virtue and effect. (Ont. Docts., pp. 6-7-10.)

So that in all these Acts they were making provision for the government, or at least for the judicial control of large territories claimed as belonging to the crown of Great Britain, and which were not included in the Province of Upper Canada.

The sixth clause of the British North American Act, 1867 (Imperial Act, 30th Vic., cap. 3), is as follows:

"The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec." (Ont. Docts., p. 11.)

And the 146th Section of the same Act under which Rupert's Land and the North-western territory could be admitted into the Union is as follows:—

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, on addresses from the Houses of Parliament of Canada and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-western Territory, or either of them, into the Union on such terms and conditions, in each case, as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." (Ont. Docts. p. 404.)

On the 17th December, 1876, the Senate and Commons of the Dominion of Canada adopted an address to the Queen, praying Her Majesty to unite Rupert's Land and the North-western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government. (Orders-in-Council, Dom. Stats., 1872, p. lxvi.)

In compliance with the terms of the above address the Rupert's Land Act, 1868 (Imperial Act, 31 and 32 Vic., cap. 105), was passed, and under the second section of that Act the term "Rupert's Land" should include the whole of the lands and territories *held, or claimed to be held*, by the said Governor and Company.

On the 19th November, 1869, the Hudson's Bay Company executed a deed of surrender to Her Majesty of Rupert's Land, which included the whole of the lands and territories held, or claimed to be held, by the Company, excepting the lands mentioned in the second and fifth paragraphs. Under the second paragraph the Company might within twelve months select a block of land adjoining each of their stations. The schedule of the lands selected is attached to the surrender, and includes about 46,000 acres of land.

Under paragraph No. 5 "the Company may within fifty years after the surrender claim in any township or district within the Fertile Belt, in which land is set out for settlement, grants of land not exceeding one-twentieth part of the land so set out."

(6.) "For the purpose of the present agreement the Fertile Belt is to be bounded as follows: On the south by the United States boundary; on the west by the Rocky Mountains; on the north by the northern branch of the Saskatchewan; on the east by Lake Winnipeg, the Lake of the Woods, and the waters connecting them." (Orders in Council, Stats. of Can., 1872, p. lxxix.)

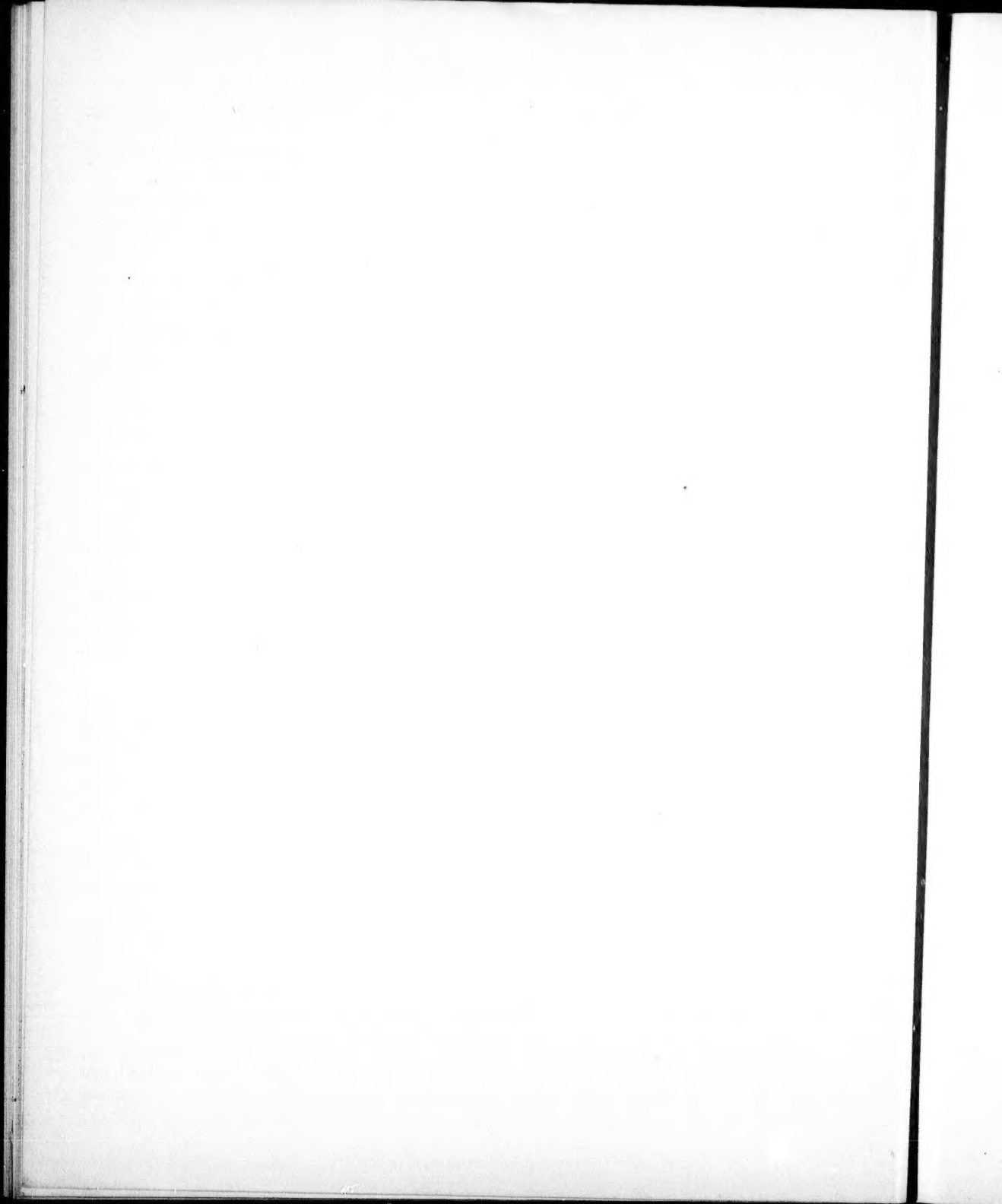
Such surrender was accepted by Her Majesty by an instrument under her sign manual, and signed on 22nd day of June, 1870.

On the 23rd June, 1870, Her Majesty, by an Order-in-Council, ordered that, after the 15th July, the said North-western Territory in Rupert's Land should be admitted and become part of the Dominion of Canada, on the Dominion paying to the Company £300,000, when Rupert's Land should be transferred to the Dominion of Canada, which transfer has been made and the consideration money paid. (Ont. Docs., pp. 405-6-7-8).

On the very threshold of Confederation Ontario knew the terms upon which Rupert's Land and the North-western Territory might be admitted into the Union; and during the negotiations that were pending between the Imperial authorities and the Dominion respecting the surrender by the Hudson's Bay Co. of their lands and territories, rights and privileges, the Ontario Government never interfered or claimed that what was about being surrendered to Her Majesty for the purpose of admission into the Dominion had at any time formed a part of the Province of Upper Canada—although, Ontario must be assumed to have known that the Hudson's Bay Company was, in 1857, claiming under its Charter that the southern boundary of the Company's territory was the height of land dividing the waters which flow into the Hudson's Bay from those emptying into the St. Lawrence and the Great Lakes, and that the western boundary was the base of the Rocky Mountains.

In thus lying by while the Dominion was purchasing this territory, and without forbidding the purchase or claiming any interest whatever in the rights and privileges about being acquired that Province is now estopped from setting up that its western boundary extends beyond the meridian passing through the point of junction of the Ohio and Mississippi rivers north of the United States and south of the Hudson's Bay Territories. All the remaining territory was "held, or claimed to be held, by the Governor and Company," and was, as such, paid for by the Dominion. (*Gregg v. Wells*, 10 A. and E., 90.)

The acceptance by the Imperial Government of a surrender of what the Hudson's Bay Company claimed as territory belonging to them was an admission that no portion of these territories



were ever included in the Province of Upper Canada. The British Government being bound by this admission, surely Ontario must be.

In 1871 a Commissioner was appointed by each of the Governments of the Dominion and Province of Ontario for the settlement of the northerly and westerly boundaries of the Province.

The instructions given to the Commissioners on behalf of the Dominion were that—

1. The boundary in question is clearly identical with the limits of the Province of Quebec, according to the 14th Geo. III., ch. 83, known as the "Quebec Act," and is described in the said Act as follows, that is to say: Having set forth the westerly position of the southern boundary of the Province as extending along the River Ohio "*westward to the banks of the Mississippi*" the description continues from thence (*i. e.*, the junction of the two rivers) "*and northward to the southern boundary of the territory granted to the Merchant Adventurers of England trading to the Hudson's Bay.*"

Having determined the precise longitude, west of Greenwich, of the extreme point of land making the junction of the north and east banks respectively of the said river, you will proceed to ascertain and define the corresponding point of longitude or intersection of the meridian passing through the said junction with the international boundary between Canada and the United States.

Looking, however, to the tracing enclosed, marked A., intending to illustrate these intersections, it is evident that such meridian would intersect the international boundary in Lake Superior.

Presuming this to be the case, you will determine and locate the said meridian, the same being the westerly portion of the boundary in question, at such a point on the northerly shore of the said lake as may be nearest to the said international boundary, and from thence survey a line due south to deep water, making the same upon and across any and all points or islands which may intervene, and from the point on the main shore formed as aforesaid, draw and mark a line due north to the southern boundary of the Hudson's Bay Territory before mentioned. This will complete the survey of the westerly boundary line sought to be established.

You will then proceed to trace out, survey and mark, eastwardly, the aforementioned *southern boundary of the territory granted to the Merchant Adventurers of England trading to Hudson's Bay.*

This is well understood to be the height of land dividing the waters which flow into Hudson's Bay from those emptying into the valleys of the Great Lakes, and forming the northern boundary of Ontario; and the same is to be traced and surveyed, following its various windings till you arrive at the angle therein between the Provinces of Ontario and Quebec, as the latter is at present bounded, having accomplished which, the same will have been completed.

The Privy Council of Ontario on receiving a copy of above instructions advise the Dominion "that the Province of Ontario claims that the boundary line is very different from the one defined by the said instructions, and cannot consent to the prosecution of the Commission for the purpose of marking on the ground the line so defined, and that the Commissioner appointed by the Government of Ontario should be instructed to abstain from taking any further action under his commission. (Ont. Docts., pp. 340-1.)

The boundaries the Ontario was willing to accept are set forth in an Order-in-Council. (Ont. Docts., p. 243.)

Until the boundaries could be definitely adjusted, provisional boundaries were agreed upon on the 3rd of June, 1874, as follows: On the west, the meridian line passing through the most easterly point of Hunter's Island, run south until it meets the Boundary Line between the United States and Canada, and north until it intersects the fifty-first parallel of latitude; and the said fifty-first parallel of latitude shall be the Conventional Boundary of the Province of Ontario on the north. (Ont. Docts., p. 347.)